IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 22

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND CITY OF LOS ANGELES,
Appellees.

No. 43

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission,
Appellees.

APPEALS FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

JOINT BRIEF FOR APPELLANTS.

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FOREWORD.

The cases covered by this brief present identical legal questions, arising out of very similar factual situations.

The cases have followed practically the same course before the California Public Utilities Commission and in the Supreme Court of California. The decisions of the Commission challenged by these appeals were rendered only six days apart (June 24 and 30, 1952). In its later (*Southern Pacific*) decision the Commission referred to and adopted the legal conclusions which it had stated in the earlier (*Santa Fe*) case. The principal appellee in both cases is the Commission, and the City of Los Angeles is a "real party in interest" in both cases.

The cases reached this Court in close succession, and by orders of May 18, 1953, were assigned for argument, one immediately following the other. In order to avoid duplication, the appellants, after consulting the Clerk of this Court, file this joint brief.

OPINIONS BELOW.

The Supreme Court of California entered final orders in each of these cases, but wrote no opinions.[1] The initial opinion and order rendered by the Public Utilities Commission of California in No. 22 is reported at 49 Cal. P. U. C. Reports 147 and is reproduced at AR. 136.[2] Its opinion and order on rehearing is reported at 51 Cal. P. U. C. Reports 771, and is reproduced at AR. 115.

The original opinion and order rendered by the Com-

[1] By said orders the Court denied appellants' separate Petitions for statutory Writs of Review to determine the validity of the Commission's decisions here challenged. Such order is a judgment upon the merits. *Napa Valley Electric Co.* v. *Railroad Commission*, 251 U. S. 366, 372-373 (1920).

[2] References to the printed record in No. 22, the *Santa Fe* case, are indicated "(AR. ....)," and references to the printed record in No. 43, the *Southern Pacific* case, by "(SR. ....)." In the latter record, the appendix to the Petition for Writ of Review in the state court is separately paged and numbered; references to pages in that appendix are therefore shown as: "SR. App. ....." Emphasis is supplied throughout this brief unless otherwise indicated.

mission in No. 43 is reported at 51 Cal. P. U. C. Reports 788, and is reproduced at SR. App. 19. The Commission's opinion and order denying rehearing is noted (but not reported) at 52 Cal. P. U. C. Reports 15, and is reproduced at SR. App. 84.

JURISDICTION.

The final judgment of the Supreme Court of California in No. 22 was entered on December 11, 1952. On February 25, 1953, a petition for appeal from said judgment was presented to the Chief Justice of that Court and on February 26, 1953, the Chief Justice signed an order allowing the appeal. The appeal was docketed on March 20, 1953.

The final judgment of the Supreme Court of California in No. 43 was entered on March 9, 1953. On March 23, 1953, a petition for appeal was presented to the Chief Justice of that Court, and on March 26, 1953, the Chief Justice signed an order allowing the appeal. This appeal was docketed on April 23, 1953.

Statements opposing jurisdiction, with motions to dismiss or affirm, were filed by the Commission in each case. A like statement and motion was filed by the City of Los Angeles, as appellee, in No. 22, and by the Cities of Los Angeles and Glendale, as "real parties in interest," in No. 43. Briefs in opposition to these motions were duly filed in each case by the appellants.

By orders entered on May 18, 1953, this Court postponed consideration of the question of the jurisdiction of the Court in these cases, pending the hearing of the cases on the merits (AR. 259; SR. 294).

The jurisdiction of this Court to review these judgments by appeal is conferred by Title 28, United States Code, Section 1257(2).

QUESTIONS PRESENTED.

In No. 22, the Public Utilities Commission of California, by its order on rehearing, assessed against appellant therein, an interstate railroad, one-half of the cost (estimated at $569,[illegible]) of reconstructing and enlarging, from two to six traffic lanes, the existing grade separations at the point where Washington Boulevard intersects appellant's railroad line in the City of Los Angeles.

In No. 43, the Commission, by its order, assessed against appellant therein, an interstate railroad, one-half of the cost (estimated at $1,493,200) of constructing a six-lane grade separation, in place of the present grade crossing, at the point where Los Feliz Boulevard in (and adjacent to the common boundary of) the cities of Los Angeles and Glendale, California, crosses said appellant's railroad line.

Pursuant to provisions of California law, each appellant petitioned the Supreme Court of California to review the assessment against it, and upon such review to hold that the order thus challenged was invalid, because in violation of the specific provisions of the Federal Constitution hereinafter cited. That Court denied each petition by summary order without opinion, two judges dissenting.

The questions presented are:

1. Whether the orders of the Commission requiring appellants to pay assessments bearing no relation to and greatly exceeding the benefits to be derived by appellants from the proposed projects will, if enforced, operate to take appellants' property for public use without just compensation, in violation of the Fourteenth Amendment.

2. Whether the orders of the Commission requiring each appellant to pay an arbitrary assessment of 50 per cent of the cost of the proposed grade separation construction with which that appellant is concerned, regard-

less of the existence or amount of benefits to be derived therefrom by that appellant, will if enforced operate to deprive appellants of their property without due process of law, and to deny to them the equal protection of the laws, all in violation of the Fourteenth Amendment.

3. Whether the orders of the Commission, requiring appellants to pay amounts not based upon, and greatly in excess of, the benefits which will accrue to them respectively from the proposed structures, will, if enforced, operate to impose undue and unreasonable burdens on interstate commerce, in violation of the Commerce Clause (Article I, Section 8, Par. 3) of the Constitution of the United States, and the National Transportation Policy declared by Congress, 54 Stat. 899, 49 U. S. C. preceding § 1.

4. Whether the orders of the Commission authorizing and directing the construction of said grade separation structures, and in each case assessing 50 per cent of the cost of such construction against the appellant concerned therewith, are "statutes of a state," within the meaning of Section 1257 (2) of Title 28, United States Code, and thus whether these causes are properly before this Court on appeal rather than on writ of certiorari.

STATUTES INVOLVED.

The statutes involved, as that term is used in Title 28, United States Code, Section 1257(2), are the final orders of the Public Utilities Commission of California, purportedly made under authority of Section 1202(c) of the Public Utilities Code of California (AR. 115; SR. App. 19), and entered in the causes now on appeal in this Court.

STATEMENT.

No. 22.

Appellant, in No. 22, the Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as the Santa Fe), is a common carrier by railroad, operating trains in interstate commerce in the western half of the United States. For many years (since 1887-1888), the Santa Fe and its predecessors have maintained the particular railroad lines involved in this case, located within the present boundaries of the City of Los Angeles, upon private rights-of-way acquired for the purpose. Two sets of tracks cross a street now known as Washington Boulevard upon two railroad viaducts constructed in 1914. These structures each provide street openings 20 feet wide, with vertical clearances of less than 14 feet (AR. 10). In 1926 the business of the railroad required the laying of an additional track; and the Santa Fe, at its own expense, made the necessary changes in the superstructure over the street (AR. 10). In 1931 the use of Washington Boulevard was greatly increased because of the City's construction of a bridge across the Los Angeles River, just east of the underpasses (AR. 35). This new bridge opened Washington Boulevard as an arterial highway, extending from the Pacific Ocean easterly to points several miles beyond the eastern limits of Los Angeles (AR. 35). An immediate increase in the volume of vehicular traffic resulted in an application by the City for authority to enlarge the separations, and the Commission in 1932 authorized the construction of two 56-foot structures to replace the existing 20-foot underpasses. Largely on the basis of benefits to be received from the new construction, the Commission allocated 75% of the cost to the City and 25% to the Santa Fe. The City failed to take action within the time limit provided by the order, which therefore lapsed (AR. 141).

By 1948, the volume of traffic on Washington Boulevard had grown tremendously. The highway, now increased generally to 60 feet in width, and connected up with important cross-country highways then existing and in the process of construction, had become a principal artery of truck and commercial traffic (AR. 17-18). The "center of gravity" for truck traffic for the entire city is at a point on this highway less than a mile west of the separations, which is the focal point of commercial highway traffic "to the four winds and from the hinterland" (AR. 18).

A traffic count taken in 1950 disclosed that during a six-hour test period in excess of 12,000 vehicles, or more than 2,000 per hour, of which more than 25% were trucks, used the Washington Boulevard underpasses (AR. 18). Construction of the new, wider separation structures is expected to result in considerable additional traffic that now uses parallel routes (AR. 17, 19). In short, the striking changes in the volume and character of the highway traffic in this area since 1914 are such that it has become necessary to expedite the flow of that traffic by the construction of six-lane underpasses, although the present structures are still perfectly adequate for present and future railroad requirements (AR. 16).

Accordingly, in 1948 the City applied to the Commission for authority to construct the two new separations here involved, each to be 90 feet wide and with added (15-feet) vertical clearance, made necessary by the greater sizes of the latest truck designs (AR. 11). After receiving evidence and considering briefs, the Commission made its initial order authorizing the construction applied for, finding that "the widening of the underpass is now necessitated by the increase in vehicular and pedestrian traffic" (AR. 141). By its order the Commission directed that the City should bear all expenses involved in the building of the new

roadway and separations, except for the sum of $95,160, which was allocated to the Santa Fe (AR. 145).

Both the City, and subsequently the Santa Fe, filed petitions for rehearing of the Commission's order, principally challenging the allocation of cost. These petitions were granted, and further hearing was held. Again there was no dispute as to the fact that, as the Commission had previously found, the new construction was necessitated wholly "by the increase in vehicular and pedestrian traffic." The Santa Fe therefore reiterated its contention that, under principles recognized by the Commission itself for many years and enunciated by this Court in a very similar case, the portion of the cost assessed against the railroad should not exceed a fair evaluation of the benefits it will receive from construction of the new separation.[3]

In its decision on rehearing (AR. 115) the Commission ordered the Santa Fe to pay a flat 50% of the cost of the new construction. While stating in passing (AR. 130): "we observe that this proposed improvement is not without benefits to the railroad," the Commission declared: "*We hold that the allocation of costs herein is an exercise of the police power, and that we are not bound to follow the benefit theory.*" Having thus concluded that, under the police power, its authority to impose upon the railroad the full burden of the cost of the new separations is unbridled by any countervailing constitutional limitations, the Commission did not attempt or pretend to justify on any factual or logical basis the assessment of costs against the Santa Fe. In brief, the 50% cost allocation to the Santa Fe is acknowledged to be wholly arbitrary in that it does not purport to represent a reasoned judgment based upon "benefits received" or,

[3] *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 430 (1935): "• • • so called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them."

indeed, to reflect any ascertainable standard of allocation of costs. The record before the Commission proved, and the Commission has never denied, that the benefits to the Santa Fe will be far less than the assessment against it. However, the Commission, on the ground that it was exercising police power, refused to measure the respective benefits to the railroad and to the City, or to allocate the costs of this public improvement on that basis (AR. 130).

Upon denial by the Commission of appellant's petition for further rehearing, the Santa Fe filed a Petition for Writ of Review in the California Supreme Court, supported by a detailed Memorandum of Points and Authorities. That court, two judges dissenting, denied the Petition, thus refusing to bring up the record (AR. 253), after which an appeal was taken to this Court within the time fixed by statute.

No. 43.

Appellant in No. 43, the Southern Pacific Company, is also an interstate common carrier by railroad. The lines which comprise its system are located in nine of the western and southwestern states.

For over seventy-five years appellant has maintained and operated a railroad line between Los Angeles and San Francisco. At a point adjacent to the present boundary between the cities of Los Angeles and Glendale this line, which is built on a private right-of-way acquired in 1873, crosses a street now known as Los Feliz Road (Boulevard) (SR. App. 104). This street was first opened across the railroad some time between 1887 and 1912 (SR. App. 31, 104), and at all times the crossing over the railroad tracks has been at grade (SR. App. 2, 20). For many years continuous 24-hour protection against collisions between vehicles on the roadway and trains or engines on the rail-

road has been afforded by crossing gates operated by railroad employees (SR. App. 87).

For at least 30 years, Los Feliz has been an important highway artery, since it provides a direct, through route between heavily populated areas of Los Angeles County (SR. App. 104-112), and connects directly with major intra- and interstate highways, notably State Highway 4, and U. S. Highways 99 and 66 (SR. App. 106-107). As early as 1925 the Commission considered the necessity for a grade separation structure at the Southern Pacific-Los Feliz crossing, and at that time a traffic count disclosed that 14,205 vehicles passed over the crossing during a typical 16-hour period.[4]

Since 1925 the volume of traffic on Los Feliz has risen to a daily average of 27,000 vehicles at the site of the crossing (SR. App. 104-105, 109), an increase of nearly 100%. The roadway has now been widened to six lanes and improved in many other particulars. This further increase in highway traffic moved the City of Glendale, in 1951, to make another application to the Commission for an order authorizing construction of a separation and apportioning the cost (SR. App. 1). The formal application asserted that the separation was required for the following purposes:

> "(a) To permit Los Feliz to carry its normal traffic without the delays caused by the passage of trains;
> "(b) To prevent traffic congestion and the blocking of traffic on San Fernando Road, a State highway; and
> "(c) To permit the public to receive and enjoy the full benefit of its present large investment in the traffic facilities afforded by the present improvements on Los Feliz" (SR. App. 4-5).

After receiving evidence, and considering briefs filed by

[4] See Commission decision No. 17330, 28 Cal. R. C. Rep. 516, 520 (1925). The Commission authorized construction of a separation estimated to cost $421,790, but the authority granted was never exercised.

certain of the parties in interest, the Commission rendered its decision approving construction of a separation estimated to cost $1,493,200, and allocating 50% of that cost to the Southern Pacific, 25% to the County of Los Angeles, and 12½% each to the cities of Los Angeles and Glendale. The evidence showed (SR. App. 28, 87), and in its opinion the Commission in effect found, that the economic justification for the proposed separation—i.e., the economic benefits which it would provide—lay principally in the elimination of delays now experienced by motor traffic at the crossing, which were calculated to cost $57,362 per year, and to a lesser extent in the net saving of crossing protection and claim expense to the railroad, amounting to $5,917 per year. The two amounts together ($63,279) were capitalized at 3%, 4% and 5% per year to produce capital sums closely approximating the estimated cost of the structure (SR. App. 28).

The railroad had contended that the Commission, in determining the allocation of costs, should be guided by the "benefit principle," set forth in this Court's opinion in *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405 (1935), and applied by the Commission itself for many years. The Commission held, however (SR. App. 32) that since its authority to allocate costs stems from the state statute and "is an exercise of *the police power* on the part of the State", "*therefore*, we are *not bound* to follow the so-called 'benefits' theory," relying upon its own prior assertion of such a principle six days earlier in No. 22, the *Santa Fe* case (AR. 115-132). Accordingly, as in No. 22, it made no attempt to justify the 50 per cent allocation to the appellant railroad, by reference to either the evidence as to relative benefits or any other ascertainable standard.

Upon denial by the Commission of its petition for rehearing (SR. App. 84), appellant filed a Petition for Writ of Review in the Supreme Court of California (SR. 1).

On March 9, 1953, that Court entered its order (SR. 287), two justices dissenting, denying the petition and thereby refusing to bring up the record, following which an appeal was duly taken to this Court.

SPECIFICATION OF ERRORS.

The Supreme Court of California erred:

1. In failing to hold that the orders of the Public Utilities Commission requiring appellants to pay assessments bearing no relation to and greatly exceeding the benefits to be derived by appellants from the respective grade separation project with which each is concerned will, if enforced, operate to take their properties for public use without just compensation, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

2. In failing to hold that the orders of the Commission requiring each appellant to pay an arbitrary assessment of fifty per cent (50%) of the cost of the grade separation construction with which it is concerned, regardless of the benefits, or any benefits to be derived therefrom by said appellant, will, if enforced, operate to deprive appellants of their property without due process of law, and to deny to them the equal protection of the laws, all in violation of the Fourteenth Amendment.

3. In failing to hold that the orders of the Commission requiring appellants to pay amounts not based upon and greatly in excess of the benefits which will accrue to them from the proposed construction will, if enforced, operate to impose undue and unreasonable burdens upon interstate commerce, in violation of the Commerce Clause (Article I, Section 8, Par. 3) of the Constitution of the United States, and the National Transportation Policy declared by Congress, 54 Stat. 899 (1940).

4. In failing to grant the appellants' Petitions for Writs of Review addressed to said court, and refusing to call up and consider the entire record before the Commission, thereby affirming and approving the Commission's action as an exercise of the police power and hence *per se* a lawful taking of railroad property regardless of the facts as to benefits received.

SUMMARY OF ARGUMENT.

A. The problem as to who should pay the cost of railroad-highway grade separation structures is not a new one. During the horse and buggy era, when a few such separations were built as safety measures, imposition of the full cost of construction upon the railroads involved was upheld by this Court on the theory that the railroads were responsible for the danger to intermittent highway traffic at grade crossings and could be required, under a state's police power, to eliminate that danger. See *e.g.*, *Missouri Pacific Ry. Co. v. Omaha*, 235 U. S. 121 (1914).

B. In 1935, however, this Court decided *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, involving the constitutionality of an arbitrary assessment by the State of Tennessee of 50% of the cost of a new rail-highway grade separation structure against the railroad. Although urged by the State to reapply the old rule, this Court, in an opinion by Mr. Justice Brandeis, refused to do so, noting that "A statute valid when enacted may become invalid by change in the conditions to which it is applied." The Court, accordingly, gave detailed consideration to the current status of railroad and highway transportation, and noted the following facts with respect to the purpose, necessity and responsibility for construction of rail-highway grade separations as of that time:

1. There have been "revolutionary changes" in trans-

portation in recent years brought about "by the widespread introduction of motor vehicles." The phenomenal increase in truck, bus and automobile traffic, and the relative decline of railroad business are facts which must be considered in determining the reasons for, and the chief beneficiaries of, modern grade separation structures.

2. In the pre-automobile era, "the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Then, it was reasonable to impose upon the railroad a large part of the cost of eliminating grade crossings; and the imposition was rarely a hardship." Now, however, the reasons for constructing grade separations are very different.

> "The main purpose of grade separation therefore is now the furtherance of uninterrupted, rapid movement by motor vehicles. In this respect grade separation is a desirable engineering feature comparable to removal of grades and curves, to widening the highway, to strengthening and draining it, to shortening distance, to setting up guard rails, and to bridging streams. The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation."

3. In earlier days, "the highways were then feeders of rail traffic, * * * and every improvement of highway facilities benefited the railroads." Now, however, roads are not primarily feeders of traffic to the railroads but are the rights-of-way of the railroad's principal competitors. Thus, "Separation of grades serves to intensify the motor competition and to further deplete rail traffic."

4. The tremendous growth of the highway transportation industry has taken away much of the railroads' freight business and an even greater share of the passenger business. Yet, despite this relative decline in their revenues,

the railroads must continue to pay for the maintenance of their own roadways and, in addition, to pay heavy state and local taxes, while the taxes paid by truck and bus owners "are clearly insufficient to pay their fair share even of the cost and maintenance of the highways which serve them."

5. The federal government, through its federal-aid highway program, has paid a large proportion of the cost of building highways throughout the country. This has greatly advanced the competitive position of highway vehicles and served further to deplete rail traffic.

Having taken cognizance of the changed conditions brought about by the transportation revolution, which now make grade separations essentially *public* improvements built for the *public* benefit, this Court held that "the promotion of public convenience will not justify requiring of a railroad any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it" and pointed out that "so-called assessments for *public* improvements laid upon particular property owners are ordinarily constitutional *only if based on benefits received by them.*"

C. Since 1935, the year of the *Nashville* decision, the progress of the "transportation revolution" has been greatly accelerated, as the motor vehicle has become a more and more important factor in the economy and life of the nation. In California trucks now receive over 75% of the total gross revenues for intrastate transportation of property, while railroads receive less than 20%. In excess of 90% of all passenger transportation throughout the United States is over the highways.

The grade-separation projects here involved illustrate the continuing progression of the factors referred to by this Court in the *Nashville* case. In the *Santa Fe* case, for example, an existing two-lane separation will be replaced

with a six-lane structure which is necessitated, not by any change in railroad operations, but solely by the increase in vehicular traffic, which includes a tremendous flow of trucks from the nearby industrial area to their destinations throughout California and other states. Thus, the construction of a new six-lane viaduct, with vertical clearance of 15 feet to accommodate huge trailer-trucks, will result in great benefit to the Santa Fe's highway competitors, but very little or none to the railroad.

Inasmuch as the grade separation involved in the *Nashville* case was held to be essentially a *public* improvement under conditions existing in 1935, it follows *a fortiori* that the grade separations here involved, under present-day transportation conditions, are also primarily public highway improvements dictated by the needs of highway traffic and of primary benefit to owners of highway vehicles. Accordingly, to impose an assessment upon a railroad for grade separation costs without reference to, and greatly in excess of, any benefit it will receive therefrom, is arbitrary and unreasonable and takes the railroad's property for public use without compensation, contrary to the requirements of the Fourteenth Amendment.

D. The "benefit principle" applied in the *Nashville* case, namely, that a railroad may be assessed for grade separation construction costs only in an amount representing a fair estimate of the benefits it will receive therefrom, has been widely adopted and reflected in substantially the whole body of thinking in the field, by impartial boards and committees, by governmental bodies and their experts, and indeed by the California Commission itself for many years prior to its decisions in the instant cases. The only explanation offered by the Commission for its present rejection of the benefit principle and return to the practice of making arbitrary assessments against the railroads without regard to benefits, is that "the tremendous increase *in motor*

vehicle traffic presents a new problem"—the very factor which led both this Court and the Commission itself to adopt the benefit principle nearly 20 years ago.

E. The arbitrary imposition of huge grade-separation costs upon the railroads without regard to the benefits they will receive therefrom is also violative of the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3) and of the National Transportation Policy declared by Congress, 54 Stat. 899 (1940). The National Transportation Policy declares that regulation of all modes of transportation must (1) promote adequate, economical and efficient service and foster sound economic conditions among the several carriers, and (2) recognize and preserve the inherent advantages of each.

The State of California is now embarked on a tremendous grade separation construction program. 294 separation projects have been proposed by a state legislative committee for the state highway system alone, while within the County of Los Angeles it is proposed to build 157 additional separations. If the vast cost of these projects may be charged to the railroads on a purely arbitrary basis, unrelated to their benefits therefrom, the National Transportation Policy will be defeated in two important respects:

First, the economic burdens will be so heavy that they cannot be met without sacrificing present standards of efficiency and economy of railroad operations. In such cases, "the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail." *Southern Pacific Company* v. *Arizona*, 325 U. S. 761, 783-84 (1945).

Second, to require the railroads to pay the cost, in excess of benefits received, of constructing what are essentially highway improvements, thus directly subsidizing their strongest competitors, constitutes a preferment by the State

of one form of transportation over the other, contrary to the Congressional policy of equality and impartiality of treatment.

F. The orders of the California Public Utilities Commission authorizing and directing construction of the grade separations here involved and apportioning costs of construction are "statutes" of a state within the meaning of Title 28 U. S. C. Section 1257(2), and these cases are therefore properly before this Court on appeals, rather than writs of certiorari. The orders are not divisible but entire, and the fact that appellants do not contest the propriety of that portion of the orders directing construction of the projects is of no significance. *Grand Trunk Western Ry. Co.* v. *Railroad Commission*, 221 U. S. 400 (1911). But whatever the Court's decision as to whether appeal or certiorari is the proper jurisdictional route, the questions presented are properly before this Court, by reason of the provisions of Title 28 U. S. C. Section 2103.

ARGUMENT.

I.

THE ORDERS OF THE CALIFORNIA COMMISSION ASSESSING 50% OF THE COST OF CONSTRUCTING CERTAIN GRADE SEPARATIONS AGAINST APPELLANTS TAKE THEIR PROPERTY WITHOUT JUST COMPENSATION CONTRARY TO THE FOURTEENTH AMENDMENT.

A. The Problem.

In 1938 the Interstate Commerce Commission, in its annual report to Congress, made this statement:

> "Whether it realizes it or not, the country has in fact experienced a transportation revolution in a very short space of time. The automotive highway vehicle has been the principal factor in this revolution. In the carriage of persons, it is now by far the most important means of transportation, and in the carriage of property it is growing in importance every day." 52nd Annual Report of I. C. C. (1938), p. 17.

This "transportation revolution," which has seen the number of automobiles registered in the United States increase from 8,000 in 1900 to over 42 millions in 1951, has completely rewoven the fabric of American life. Because of its impact, large cities have been created and others have declined; once-important industries have been abandoned, while new industries have arisen in their stead. In countless ways the daily life of the country is affected by the tremendous growth of the automotive industry.

How best to send a huge and ever-increasing volume of highway traffic to its destination quickly, directly, and with a minimum of delay has posed a serious and continuing engineering problem. Great highways capable of carrying these millions of vehicles had to be constructed; old roads

that proved incapable of carrying present day traffic loads are being reconstructed. Public works projects of almost incredible magnitude have been carried out, and non-stop superhighways span increasingly large sections of the nation.

One of the most difficult facets of the problem of expediting the flow of highway traffic has been the necessity of eliminating delays incident to the intersection of opposing streams of traffic. While a number of different expedients have been devised, it has been found that the only satisfactory solution where the traffic is particularly heavy is to separate the grades at the point of intersection by means of a bridge, so that one stream may flow uninterruptedly over the other. The Virginia highway approaches to Washington, D. C., present familiar examples of this kind of construction.

A similar difficulty exists in the case of railroad-highway intersections. Prior to the advent of the automobile, a few rail-highway grade separations had been built as safety measures, but the overwhelming majority of crossings remained at grade. With the "transportation revolution," however, has come an increasingly insistent demand on the part of highway users—truck and bus operators and ordinary motorists—for elimination of railroad grade crossings and the delays necessarily incident to such crossings. As was stated by the Director of the Institute of Transportation and Traffic Engineering of the University of California in 1950:

> "During the past two or three years there has been mounting public interest in, and pressure for, increased railroad-highway crossing separation. It would appear that this pressure, which may be taken as a measure of an unfilled need, is out of proportion to the accident hazard on the public highways. It would appear further, that this pressure derives, in

considerable measure, from irritation on the part of an ever-increasing driving public, over delay factors rather than accident hazard.'"[5]

The cases now before this Court are good examples of this development. In the *Santa Fe* case a grade separation presently exists. But, because truck, bus and automobile traffic has multiplied a hundred-fold in recent years, a six-lane road is now deemed to be necessary where two lanes originally sufficed, and as a result the present viaduct must be replaced with a much larger one. There is here no question of danger or accidents from railroad operations. Indeed, the Santa Fe has had no costs whatever for property damage or personal injury claims at its Washington Boulevard crossing since 1914, when the present separation structures were built (AR. 45). The Commission itself specifically found that the new construction is necessitated wholly "by the increase in vehicular and pedestrian traffic" (AR. 141).

Like so many desirable public projects, the construction of grade-separation structures is immensely expensive. The structures involved in the *Santa Fe* case are estimated to cost $569,355, while the separation involved in the *Southern Pacific* case will cost at least $1,493,200. The California Commission estimated in 1949 that to eliminate all grade crossings on main and branch lines within the State would cost approximately two and one-half *billion* dollars,[6] and present grade separation proposals run into many millions. A report to the California Assembly's Joint Fact-Finding Committee on Highways in 1952 recommends construction of 273 new railroad separation structures and reconstruction of 21 existing separations,

[5] Davis, *The Railroad Grade Crossing Problem*, Proceedings of Engineering Section, 1950 Governor's Traffic Safety Conference (California), p. 31.

[6] Public Utilities Commission of California, "General State-Wide Grade Crossing Survey" (AR. 24).

a total of 294, on the *state highway system alone.*[7] In addition, proposed separation projects on county roads and city streets which are not a part of the state highway system run into the hundreds. In 1951, for example, a sub-committee of the Los Angeles Grade Crossing Committee found necessary the construction or reconstruction of separations at 157 crossings *within the County of Los Angeles.*[8] And the City of Fresno alone presently has on file with the Commission an application requesting new construction to eliminate grade crossings in that city, the first step of which is estimated to cost $14,168,520! Since the cost of separation projects now actively and officially proposed in the State of California alone may well reach $200,000,000, it is not strange that the Commission's abrupt departure from the benefit principle and its adoption of the position that it may arbitrarily assess grade separation costs against appellants as an exercise of the police power should be of surpassing importance to the parties concerned.

B. The Position of the Parties.

The question of who must pay for the construction of railroad-highway grade separations is not a new one. Years ago, a number of cases presenting this question reached this Court and the appellate courts of the States. In these early cases the dominant consideration was the protection of intermittent horse-and-buggy traffic from speeding railroad locomotives. Since the railroad was considered a dangerous instrumentality which had created the safety problem by running its equipment across public

[7] *California Highways,* An Engineering Study of Improvements Required to Serve Present and Future Travel prepared for Joint Fact-Finding Committee on Highways, California Legislature (1952), p. 53.

[8] Report dated January 5, 1951 by sub-committee of Los Angeles County Grade Crossing Committee. See SR. 123, SR. App. 24.

thoroughfares, this Court held that a State, in the exercise of the police power, could constitutionally order the railroad to remove that danger by erecting a grade separation at its own expense. Accordingly, as early as 1914 this Court could say:

> "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks or to carry their tracks over such highways." *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis*, 232 U. S. 430, 438 (1914).

It is upon this and similar early decisions[9] that the Commission now relies.

These cases, at the times and under the circumstances in which they were decided, undoubtedly stood for the broad proposition stated in the *Minneapolis* case. Subsequent to these decisions, however, this Court had before it another rail-highway grade separation case in which, for the first time, the Court was apprised of "the revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles." *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 416 (1935). In that case a state statute imposing 50% of the costs of constructing rail-highway grade separations against the railroad involved was challenged on the ground that such a special assessment, under present-day transportation conditions, appropriates the railroad's property without just compensation, contrary to the Fourteenth

[9] In support of the proposition that it may assess all, or any part, of the costs of constructing a grade separation against the railroad, the Commission cited this Court's decisions in *Erie R. Co.* v. *Board of Public Utility Commissioners*, 254 U. S. 394 (1920); *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis*, 232 U. S. 430 (1914); *Missouri Pacific Ry Co.* v. *Omaha*, 235 U. S. 121 (1914); and *Lehigh Valley R. Co.* v. *Board of Commissioners*, 278 U. S. 24 (1928) See AR. 128-129.

Amendment. Recognizing that the law governing this question was "well settled" contrary to his position as long ago as 1914, counsel for the railroad frankly stated in his brief to this Court:

> "The revolution in transportation and the incidental grade-crossing problem necessitates a restatement of the ancient and obsolete rules of law with reference thereto." See 79 L. Ed. 952.

This Court, in an opinion by Mr. Justice Brandeis, reversed the judgment of the state supreme court, which had refused to consider the problem in the light of the recent significant changes in transportation conditions brought about by the highway motor vehicle. While reiteration of the Court's statement in the *Minneapolis* case (*supra*, p. 23) would have disposed of the appeal if it had been the Court's intention, notwithstanding changed conditions, to reapply the rule there stated, this Court pointed out, instead, that changes in conditions must be considered: "A statute valid when enacted may become invalid by change in the conditions to which it is applied." 294 U. S. 415. This Court then detailed at considerable length the facts in the record or within judicial notice which demonstrated that grade separations are no longer constructed primarily because of the danger incident to rail operations, as was true when the "rule" now relied upon by the Commission was formulated, but are designed and built essentially for the purpose of speeding continuous streams of truck, bus and automobile traffic past intersecting railroad lines. As this Court noted in its opinion:

> "The main purpose of grade separation therefore is now the furtherance of uninterrupted, rapid movement by motor vehicles. In this respect grade separation is a desirable engineering feature comparable to removal of grades and curves, to widening the highway, to strengthening and draining it, to shortening dis-

tance, to setting up guard rails, and to bridging streams. The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." 294 U. S. 421-422.

This Court's opinion in the *Nashville* case demonstrated beyond question, first, that under the changed transportation conditions prevailing as early as 1935 grade separations are essentially *public* improvements, since it is the public which reaps the greater share of the benefits of grade crossing elimination; and second, that in most cases the lion's share of the "public" benefit goes to the railroad's competitors, the trucking and motor bus companies, since any highway improvement automatically reduces the costs and increases the efficiency of their operations. Thus, to the extent that a railroad is assessed more for construction of a grade separation than it receives in benefits therefrom, it is being required to bear the cost of a *public* improvement which results in substantial direct benefits to its chief competitors.

With these conclusions drawn from a consideration of the "revolutionary changes" brought about by the widespread introduction of the motor vehicle, this Court stated the applicable legal principles as follows:

"The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway established as arbitrary and unreasonable the imposition upon it of one-half the cost of the underpass. The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expediture of money, unless it can be shown that a duty to provide the particular convenience rests upon it. * * *

"It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest

> of public health, safety and morals. * * * But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. [Citations.] While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; [citations] *so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them. Myles Salt Co.* v. *Iberia & St. M. Drainage Dist.*, 239 U. S. 478; *Gast Realty & Invest. Co.* v. *Schneider Granite Co.*, 240 U. S. 55; *Kansas City S. R. Co.* v. *Road Improv. Dist.*, 256 U. S. 658." 294 U. S. at 428-430.

In short, this Court concluded that grade separations having become, in practical effect, *public* improvements designed and built primarily for the *public* benefit, their costs cannot be assessed arbitrarily against the railroads, but are ordinarily constitutional "only if based on benefits received by them," citing cases involving the constitutionality of special assessments levied against adjacent property owners for the construction of public improvements affecting their property.

The principle that a State may not, under either the taxing power or the "police power," force an arbitrarily selected few to carry the burdens or promote the conveniences of the general public has long been established as a basic tenet of American constitutional law. In 1897 this Court, speaking through Mr. Justice Harlan, held unequivocally that the Fourteenth Amendment to the Constitution requires that just compensation be paid for property taken by a State for public or private use, just as the Fifth Amendment requires payment of just compensation by the federal government. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897). Cases involving special

assessments, among them those cited by Mr. Justice Brandeis in the *Nashville* case, well illustrate this principle. For example, in *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478 (1916), where certain lands containing salt deposits were included in a drainage district and assessed a tax for construction of drainage improvements which would benefit other lands in the district but could not possibly benefit the salt company, this Court unanimously held the assessment unconstitutional, stating:

> "We are not dealing with motives alone but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property but solely of the improvement of the property of others—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind." *Id.*, at 485. See also, *e.g.*, *Kansas City Southern R. Co.* v. *Road District*, 256 U. S. 658 (1921).[10]

We assume that it would not be disputed, therefore, that the Commission could not constitutionally order one of the appellants to pay the cost of constructing a public park, swimming pool or library, except as it pays taxes on the same basis as any other individual or corporation. It is appellants' contention that, to a far greater extent than in 1935, when the *Nashville* case was decided, grade separations are now also essentially *public* improvements constructed at the insistence of those who operate motor vehicles and for their benefit. To the extent that the railroad also benefits from construction of the separation, through elimination of the expense of crossing gates or other safety devices and reduction of accident claims, for example, it must of course contribute to the cost of the

[10] Similar conclusions have been reached by this Court when the attempt to impose public burdens upon individuals was made under the State's "police power." See *Chicago, St. P., M. & O. Ry. Co.* v. *Holmberg*, 282 U. S. 162 (1930) and cases cited.

new structure, just as adjacent property owners pay the cost of public improvements according to the benefits they receive. *Kansas City Southern Ry. Co. v. Road District*, 266 U. S. 379 (1924); *Myles Salt Co. v. Iberia & St. M. Drainage District*, 239 U. S. 478 (1916). But to the extent that a grade separation is constructed to further the convenience and improve the economy of another mode of transportation, the cost cannot logically and properly be assessed against one who receives no benefits.

The Commission avoids the application of the principles just stated by the convenient expedient of ignoring the undisputed facts surrounding present-day transportation conditions and relying upon the State's "police power," as applied in the grade separation cases of the horse-and-buggy era. In the Commission's view, the *Nashville* case "can have no bearing on the problem" because it "is applicable only to the factual situation there presented." (Alt. 179.) In thus "distinguishing" the *Nashville* case and returning once more to the rule applicable to the facts of the pre-automobile age, however, the Commission ignores the fact, which the Court will immediately discern from reading the opinion of Mr. Justice Brandeis, that the central theme, the core of the decision, is the fact that a "transportation revolution" has occurred; that the responsibilities of users of the highways and the railroad respectively, and the benefits accruing to each from grade separation construction, have changed materially with the coming of the automobile age and the new era in transportation. In this essential element the *Nashville* case has not been and cannot be distinguished.

C. The Present Inquiry.

The *Nashville* case was decided upon the basis of the facts available to the Court in 1935. At that time, as the opinion points out in analytical detail, the "transporta-

tion revolution" had brought about dramatic changes in travel and transportation practices. Through the great growth in motor vehicle use the highways had become a great independent system of transportation, competitive with the railroads. The change in the necessity, purpose and chief beneficiaries of grade separation construction was already sufficiently marked at that time that this Court properly described such separations as *public* improvements.

As we shall demonstrate, however, subsequent events have shown that as of 1935 the "transportation revolution," while very real, was still in its incipiency. Since that time the ownership and use of motor vehicles have increased to heights not dreamed of 18 years ago. Competition from motor vehicles has taken increasingly greater proportions of freight and passenger business formerly handled by railroads. As a result, grade separations constructed today, even more than in 1935, reflect the phenomenal growth of competitive *highway* transportation, rather than an expansion of railroad facilities, as was the case at the turn of the century.

The marked and extreme progression of the "transportation revolution" from the time of the *Nashville* decision to the present will be examined in some detail *infra*. But some of its features should be pointed out initially to indicate the sharp and continuing ascent of the curve of highway transportation. Since 1935, the number of automobiles in the United States has increased over 88%, to a total, in 1951, of 42,500,000. During that same period, truck and bus registration has increased an outstanding 143%, while the number of units of railroad equipment of all categories has declined. During the same 16 year period following the *Nashville* decision, moreover, the number of miles of surfaced roads outside of cities increased

by 75%, while the number of miles of railroad lines operated in the United States was declining by nearly 20,000.

These figures are reflected in statistics showing the extent to which highway vehicles have supplanted railroads as carriers of passengers and freight in recent years. In the *Nashville* case the Court declared: "Separation of grades serves to intensify the motor competition and to further deplete rail traffic." (294 U. S. at 423.) In 1951, 16 years later, 87% of all *intercity* passenger miles were traveled by automobile, 6% additional by motor bus, and only 7% by train. Between 1936 and 1951 the amount of freight hauled by intercity trucks increased by 350%. And because motor freight is higher rated traffic than railroad freight, on the average, intercity motor carriers in 1950 received 47.1% as much freight revenues as did the nation's railroads, despite enormous differences in operating expenses and costs of plant and equipment. In an official statement of American Trucking Association, Inc., which is presently receiving wide publicity, it is declared that "on the basis of all tons of freight moved, trucks haul 75% of the total." See *Time*, Aug. 31, 1953, p. 3.

The railroads have lost almost all of some types of traffic to motor carriers. An expert witness testified without contradiction in the *Santa Fe* case that highway competition has taken from the railroads almost all freight business within a distance of 50 miles from the larger cities (AR. 24). And the upsurge of motor carriers as the *principal* carriers of intrastate freight traffic is demonstrated by the fact that in California, in 1951, highway carriers received 75.7% of all gross operating revenues received by carriers for intrastate transportation of property, whereas the railroads received only 19.3%!

It should be apparent even from this brief resumé that the trends in transportation practices—the "transporta-

tion revolution"— which this Court noted in the *Nashville* case have continued with ever-increasing impetus to the present time. If imposition of an arbitrary percentage of the costs upon the railroad was a taking of property for a *public* use without just compensation in 1935, it follows *a fortiori* that such an arbitrary assessment, under present-day conditions, violates established constitutional principles.

But because the Commission has refused to follow this Court's latest decision on the subject and regards that decision as "applicable only to the factual situation there presented" (AR. 179), appellants consider it desirable to point out in somewhat greater detail the full reach of the revolution in transportation conditions that has taken place in the past 50 years, and notably the acceleration of the trend in the years since the *Nashville* case was decided.

In the *Nashville* case, Mr. Justice Brandeis set out the factors for consideration in determining whether an arbitrary assessment of grade separation costs upon the railroad was unjust and unreasonable as follows:

> "The charge of arbitrariness is based primarily upon [1] the revolutionary changes incident to transportation wrought in recent years by the wide-spread introduction of motor vehicles; [2] the assumption by the Federal Government of the functions of road builder; [3] the resulting depletion of rail revenues; [4] the change in the character, the construction and the use of highways; [5] the change in the occasion for elimination of grade crossings, in the purpose of such elimination, and in the chief beneficiaries thereof; and [6] the change in the relative responsibility of the railroads and vehicles moving on the highway as elements of danger and causes of accidents." 294 U. S. at 416.

With these considerations as guides, we shall indicate the

development of the various phases of the problem to the date of the *Nashville* case and their subsequent history as shown in the record and by facts of which this Court may take judicial notice.

1. "The Revolutionary Changes Incident to Transportation Wrought in Recent Years By the Introduction of Motor Vehicles."

The "horse-and-buggy" days are receding rapidly from the memories of men into the pages of history. But to those who remember the days when the automobile was a new and rare object, the changes brought about by the automobile, the truck and the bus are awe-inspiring. For nearly a century after the steam locomotive demonstrated its superiority over the horse-drawn vehicle on the tracks of the Baltimore and Ohio Railroad, the railroad was considered the ideal instrument for public transportation. Towns and cities were established along the line of the railroad and were dependent upon it for commerce and communication. Except for farm vehicles used for local distribution of supplies, little or no freight was transported overland except by railroad. And apart from carriages used for short journeys, all overland passenger travel was also by railroad. It was upon the "particular facts" pertinent to this era that this Court upheld state action requiring the railroads to pay the entire cost of building grade separations.[11]

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[11] The importance of the "particular facts" presented in a case involving a taking of property for public use was emphasized by Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413 (1920):

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation

Statistics present a dramatic picture of the change in transportation practices with the advent of the motor vehicle. In 1900, only 8,000 automobiles were registered in the United States, and no trucks or buses had been manufactured. By 1915 less than 2,500,000 automobiles were registered, but in the next fifteen years the number had leaped to nearly 23,000,000, an increase of 820%. Since 1935, the year of this Court's decision in the *Nashville* case, the number of automobiles has increased from approximately 22,500,000 to over 42,500,000 in 1951, an increase of over 88%, despite the fact that few automobiles were manufactured during the war years.[12] Automobile ownership has increased so much faster than the population that there is now an automobile for every 2.6 persons over 18 years of age in this country, whereas in 1910 there was only one automobile for every 125.2 persons over 18.[13]

Even more extreme has been the recent increase in truck registration. In 1900 no trucks were registered in the United States, and in 1915 only 158,506. By 1930, however, the number had increased to over 3,500,000. Since the *Nashville* case was decided in 1935, the number of trucks in this country has increased by 143% to a 1951 total of over 8,500,000. During that same period the number of motor buses has increased by the same percentage figure.

But mere numbers of vehicles do not begin to tell the story of the change in transportation conditions in recent

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must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends upon the particular facts.*"

[12] Automobile, truck and bus registration figures for the years 1900-1951 are contained in Table 1 of Appendix A to this brief.

[13] Bureau of Public Roads, *Highway Statistics 1950*, p. 17.

years. In its *Nashville* opinion this Court referred to the fact that:

> "Trucks, some of them 70 feet in length and many weighing with load as much as 50,000 pounds, operated by common carriers, by contract carrier and by private concerns, will compete for the most profitable classes of freight." 294 U. S. at 426.

Since the time of that decision, the size and carrying capacity of the average truck have increased tremendously. In 1936, the average loads carried by trucks on main rural roads was only 2.90 tons and by combinations (trailer trucks) was 6.90 tons. By 1951, the average load carried by trucks had risen to 5.66 tons and by combinations to 10.83 tons, increases of 95% and 57% respectively.[14]

The modern truck is not only capable of carrying heavier loads but can carry them faster and farther than its predecessors. This combination of factors is reflected in figures showing the number of ton-miles carried by trucks. In 1936, the year following the *Nashville* decision, trucks and combinations carried 28,005 million ton miles over main rural roads, but that figure had been more than doubled by 1941, and in 1951 had reached the amazing total of 126,402 million, an increase over 1936 of 350%![15]

To keep pace with this momentous increase in the number, size and use of highway vehicles, a huge system of primary and secondary roads has been construed with a corresponding multiplication of the number of railroad crossings. The fact that there was almost no overland travel, except by railroad, during the nineteenth century is well illustrated by the fact that there existed only 153,530 miles of surfaced rural roads in the United States in 1904. By 1935, however, that figure had risen to 1,063,000 miles,

[14] See Bureau of Public Roads, *Highway Statistics, Summary to 1945*, p. 31 and *Highway Statistics, 1951*, p. 28.

[15] See Table 2 of Appendix A to this brief.

an increase of 525%; and by 1951 there were 1,723,175 miles, another increase of 75%.[16]

It is of especial significance that in contrast to this tremendous upsurge of highway development and use, and as a direct result of the inroads of truck and automobile competition, railroads have not been able to expand their facilities in proportion to the increase in population and national income. Indeed, Class I railroad mileage reached its peak more than twenty years ago when 408,237 miles were operated and has declined steadily ever since to a 1951 total of 382,575. Main-line trackage today is actually less than in 1914.[17]

A similar trend is disclosed by the figures as to ownership of railroad locomotives, passenger cars and freight cars. The high point of locomotive ownership was in 1924, when 65,358 were being operated by Class I railroads. As of 1935 that figure had already been reduced to 46,594, and during the intervening years locomotive ownership has dropped another 6,000 units. It should be noted that this is 18,000 fewer locomotives than were in service in 1911![18]

Passenger-car ownership has shown a similar history. From a peak of 55,040 units in 1924, ownership of passenger cars by Class I railroads has now dropped to 36,130, which is over 10,000 fewer cars than were in service in 1911.[19]

Freight-car ownership has followed a pattern similar to, but not identical with, ownership of locomotives and pas-

[16] See Table 3 of Appendix A to this brief. It is also significant that the percentage of *surfaced* roads to total road mileage, which was only 13% as recently as 1921, had risen to 58% by 1951. *Ibid.*

[17] See Interstate Commerce Commission, *Statistics of Railways in the United States.*

[18] *Ibid.*

[19] *Ibid.*

senger cars. From 1915 freight cars owned by Class I carriers rose gradually to a peak of 2,387,551 in 1925, and then began a decline comparable to those of the other components. In 1941 the decline was temporarily halted because of the extraordinary demands upon the railroads created by mobilization and production for war, but after 1945 the decline commenced anew. As a result, there are now over 500,000 fewer freight cars in service on Class I railroads than in 1915[20]; and these have proved fully adequate to meet the demands of the shipping public.

It should be emphasized also that while the carrying capacity and general efficiency of railroad equipment has improved during this period, there has been an even greater increase in the size and efficiency of trucks and busses. Thus, more significance is given the fact that the units of railroad equipment have substantially declined in number, while highway vehicles have greatly multiplied.

In the case of many transportation services, highway vehicles have almost entirely superseded use of railroads. For example, 89% of all farm products reach their market by highway; 85% of the nation's urban population receive their fluid milk from the country by truck; and 65% of the country's livestock go to market by truck. It has been estimated that use of trucks serving agriculture has risen 60% since 1941 and 1,700% since 1920.[21] Furthermore, where towns were usually centered closely around the railroad station in earlier days, "Suburban areas, whose building was largely the result of highway transportation, now represent 34 per cent of all metropolitan populations."[22]

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[20] *Ibid.*

[21] National Highway Users Conference, Inc. *The Highway Transportation Story* (1950), p. 5.

[22] *Id* at p. 24. A Michigan survey showed that of 850,000 workers, 635,000 depended on cars to reach their work. *Ibid.*

The importance of the relative decline in railroad transportation and growth of highway transportation is twofold: First, it indicates clearly the purpose and necessity of modern grade-separation structures. As will be pointed out below (*infra*, pp. 50-52), prior to general use of the motor vehicle, grade separations were constructed primarily if not entirely as safety measures. Since the railroad had created the hazard, it was thought reasonable and proper, particularly in view of its virtual monopoly over public transportation, to require the railroad to remove that hazard at its own cost.

Today, however, it is primarily the increase in the number and size of motor vehicles that makes grade separations necessary. As was recently stated by Dr. A. Kenneth Beggs, Senior Economist of Stanford Research Institute, in an extended analysis of the railway-highway grade crossing problem:

> "The demand for grade crossing improvements and eliminations since 1920 has arisen not only from considerations of public safety but more importantly from increasing use of the nation's highways and the resulting desire to reduce traffic delays and congestion on the highway system."[23]

In its decision in the *Santa Fe* case the Commission found that this was the necessity to be served by the new construction in Washington Boulevard, stating:

> "• • • The reasons advanced by applicant for widening the underpasses, which reasons were not disputed by protestant, were the increase in motor vehicle traffic, both passenger and commercial, the need to make Washington Boulevard a through street for its entire length, the need for a bus line to transport passengers through that area, and the inadequate height of the present underpass. It was pointed out that the height of the

[23] Beggs, *The Railway-Highway Grade Crossing Problem* (Stanford Research Institute, Stanford, Cal. 1952), p. 3.

> underpass should be increased so as to provide adequate clearance for commercial vehicles." (AR. 141-2.)

In both cases the Commission found that the construction or enlargement of the grade separation was justified by the prospective benefits to users of the highways. In neither case was safety or benefit to the railroad a significant factor in the Commission's determination.

The second major fact arising out of the coming of age of the motor vehicle is that streets and highways are no longer primarily feeders of business to the railroad but constitute, instead, the rights-of-way of its chief competitors. Thus, where grade separation structures once served the railroad's purposes by enabling horse-drawn vehicles to drive safely up to the railroad depot, they now serve primarily to speed up the service and reduce the costs of the railroad's competitors. In the *Nashville* case this court stressed the fact that in the days before motor vehicles became commercially important:

> "* * * the need for eliminating existing crossings, and the need of new highways free from grade crossings, arose usually from the growth of the community in which the grade separation was made; this growth was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident of the growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth *and every improvement of highway facilities benefited the railroad.*" 294 U. S. at 423.

No such situation existed at the time of the *Nashville* decision or exists today, but rather the contrary. Taking California as an example, census figures show that between 1920 and 1950 the State's population has more than tripled, having increased from 3,426,861 to 10,586,223.[24] During

[24] Statistical Abstract of the United States, 1952, pp. 13, 14.

that same period, however, the miles of railroad operated in California actually *decreased* approximately 10%, from 8,356 miles to 7,533 miles.[25] On the other hand, California state highway mileage increased by an astounding 596.9%, from only 2,008 miles in 1920 to 13,994 miles in 1949 (AR. 20). We direct the particular attention of the Court to the figures assembled by a committee of the California Senate, showing that in 1951 the steam railroads received only 19.3% of the gross revenue for the intrastate transportation of property in California, while highway carriers took 75.7%.[26]

It is thus perfectly apparent that California's remarkable recent growth has not been "mainly the result of the transportation facilities offered through the railroad," *supra*, but instead reflects and is reflected by the great increase in *highway* traffic. Furthermore, the fact that, despite the tremendous growth of California's population and highway mileage, the State's railroad facilities have remained relatively static is conclusive proof that, under modern transportation conditions, improvement of highway facilities not only does not materially benefit the railroads but gives vital aid to their competitors.

This is particularly true in the cases now before this Court. In the *Southern Pacific* case the uncontradicted evidence is that Los Feliz Boulevard is a major traffic artery, along which vehicular traffic originating or terminating in the metropolitan area of Los Angeles travels en route to Antelope Valley, the Palm Springs area, and to state highways leading to the San Joaquin and Sacramento Valleys and the San Francisco Bay area, all of which are also served by the Southern Pacific (SR. App. 105-108). The record shows that on week-days an average of over 1,000 trucks,

[25] *Id.*, p. 507.

[26] See Table 4 of Appendix A to this brief.

tank trucks and truck-trailer combinations (excluding light panel trucks) use the Los Feliz crossing daily (SR. App. 91), and it is expected that present and contemplated changes in the Los Angeles highway system will substantially increase that flow (SR. App. 106, 110-112).

A similar situation exists in the case of the Washington Boulevard crossing of the Santa Fe. A principal witness for the City of Los Angeles testified that during a test period over 2,000 cars and trucks per hour went through the present underpasses, that over 25% of the vehicles using the present underpass were trucks, and that if the underpasses under the Santa Fe's tracks were enlarged it was his opinion that more large trucks would use the Washington Boulevard (AR. 18, 19). With respect to the nature of the traffic using Washington Boulevard, this witness gave the following testimony:

> "Q. Can you characterize Washington Boulevard as an important thoroughfare for trucks or a truck route? I don't know what your language is in traffic engineering but could you describe it from the standpoint of truck useage?
>
> "A. Well, the best answer to that is first, you have got to have origin and destination. Your trucks that move east and west, south of the congested area have an objective. They are going to, in the main, either up the coast or to Sepulveda Boulevard or into the Valley or going either to the Harbor. The center of gravity is Washington and Alameda and from that point they move out in the four directions. Now, truckers, it has been my experience, based on studies, that truckers will seek their own level. In other words, the drivers seek out certain routes, dependent upon their objectives. It happens to be that Washington Boulevard is in a good position in relation to the other phases of traffic problems that they seek out Washington Boulevard as the center, from the center of industry, Harbor and it connects to the four trade winds from the hinterland." (Tr. 114, AR. 18.)

The Santa Fe presented evidence that construction of the new underpass would not increase its business but on the contrary, would enhance the trend toward diversion of traffic to trucks (AR. 16, 30, 123, 124). Arthur C. Jenkins, a consulting engineer with many years experience in the transportation field, testified that:

> "In the early period of our history, highways served largely as feeders to the railroads. Today, highways operate as the arteries of competitive traffic, and competition has taken over practically all types of transportation from the railroad within a distance of 50 miles from the larger cities." (AR. 24.)

He also pointed out that "the volume of traffic, of truck traffic on Washington Boulevard compared to the total traffic is a greater percentage than is found generally on the other state highways on which I have obtained figures" (AR. 26, Tr. p. 300). Moreover, a state highway engineer testified that Washington Boulevard "is a so-called primary or major highway built to major highway standards" (AR. 32). The Commission itself stated:

> "According to the evidence presented, the widening of the underpass is now necessitated by the increase in vehicular and pedestrian traffic. The area in the vicinity of the two underpasses here under consideration has become one of the leading industrial areas of Los Angeles and its environs. As a result, there is a large amount of motor truck traffic hauling to and from these areas" (AR. 141).

Thus, in assessing against the railroad arbitrary costs in excess of the benefits it receives from a grade separation, the Commission is, in effect, ordering the railroad to subsidize its competitors, the truck and motor bus industries. If, as the Commission has found, in respect of the two separations here involved, the benefits to users of the street justify the new construction, *supra*, pp. 7, 11, those persons

can and should be required to pay for the benefits they receive. But to require the railroad to pay an arbitrary 50% of the cost of this kind of public improvement and in addition to pay its share of general taxes,[27] thus contributing very substantially to the payment of the other half of the cost, is clearly unjust. In the *Nashville* case this Court said:

> "* * * Separation of grades serves to intensify the motor competition and to further deplete rail traffic. The avoidance thereby made possible of traffic interruptions incident to crossing at grade are now of far greater importance to the highway users than it is to the railroad crossed. For the rail operations are few; those of motor vehicles very numerous." 294 U. S. at 423-24.

Those considerations weigh even more strongly today against an arbitrary allocation of co[illegible].

2. "The Assumption By the Federal Government of the Functions of Road Builder."

As this Court has indicated, nothing more strongly emphasizes the nature and extent of the "transportation revolution" than the role played by the federal government as "Road Builder", and the position of the government as to the allocation of the cost of grade separations (this brief, *infra*, p. 62). Prior to 1900 practically all roads were under the control of local officials. There was, of course, no gasoline tax, no highway use tax and few vehicle taxes. All funds for construction and maintenance of roads necessarily came from general property taxes laid upon landowners in the taxing district.[28] Since highways were so little used

[27] It was pointed out in the *Nashville* case that while nearly 28% of the gross revenues of a railroad are required annually to pay state and local taxes and the cost of maintaining its roadway, commercial motor carriers moving on public roads contribute only 7% of their gross revenues in state and local taxes. 294 U. S. 427-28. That ratio is now even more disproportionate (AR. 22).

[28] Beggs, *op. cit. supra*, (note 23), p. 4.

there were, in short, no public funds available for large-scale highway improvements. If the railroads had not been required to bear the cost of grade separations, none would have been built.

In 1916, however, the federal government initiated the present system of providing federal aid to the states for highway purposes. By the Federal Road Act of 1916, 39 Stat. 355, Congress made available an initial appropriation of $75,000,000 to be apportioned among the states in proportion to their area, population and post road mileage. It also required participating states to establish state highway departments.

The Federal Highway Act of 1921, 42 Stat. 212, established the present Primary Federal Aid Highway System and provided that up to 50% of the cost of constructing such highways would be furnished by the federal government. By the Hayden-Cartwright Act of 1934, 48 Stat. 995, the Bureau of Public Roads was enabled to extend federal aid to roads outside the primary system and to establish the Federal Aid Secondary System. Congress made annual appropriations for the support of these programs, and under these basic statutes was built the gigantic network of roads that now crosses and criss-crosses the nation.

The pattern for comprehensive improvements for the succeeding 20 years was laid down by the Federal Aid Highway Act of 1944, 62 Stat. 1105, in which specific grants were assigned for aid to construction on the Federal Aid System in rural and urban areas and for the Federal Aid Secondary System. The Act provided for federal contributions to the extent of $500,000,000 in each of the first three postwar years, and in 1948 the Act was extended for a period of two years with annual authorizations of $450,000,000. The Federal-Aid Highway Act of 1950, 64 Stat. 785, once more increased annual authorizations to $500,000,000 a year for the

following two years, and the Federal-Aid Highway Act of 1952 has increased that amount by $50,000,000 annually for fiscal years 1954 and 1955.

The federal aid program has become the backbone of the nation's highway system. Between 1916 and 1943, the Bureau of Public Roads approved federal appropriations of over $3,000,000,000 to the states for highway purposes,[29] and of course more billions of dollars have since been granted to the States, beginning with the 1944 Act. For the period from June 30, 1917 through June 30, 1950, the State of California alone has received $265,194,138, which is over 18% of the total revenues received by the State Division of Highways from all sources during that period.[30] Since many federal aid highways go through cities, the federal government has aided cities as well as States to improve their street facilities. In fact, every Federal-Aid Highway Act since 1944 has contained a specific authorization for federal aid to highways in urban areas, the 1952 Act authorizing grants of $137,500,000 for this purpose.

Thus, the federal government has furnished tremendous impetus to the spectacular growth of motor vehicle transportation. It is as a direct result of federal legislation that state highway departments were first organized and state highway programs initiated. It is also as a result of the federal government's action that highways of relatively uniform construction, capable of carrying the heavy loads to which they are now subjected, were built.

In addition to acting as a supervising and coordinating agency, the federal government has granted vast sums of money to the states for construction of roads, highways, and city streets. Without these grants, it is unques-

[29] Labatut and Lane, *Highways in Our National Life* (1950), pp. 91-93.

[30] See Third Annual Report of Division of Highways of California Department of Public Works, p. 57.

tioned that the thick network of highways which now blankets this country would never have been constructed.

The result of the federal government's program has thus been to improve the operating cost and efficiency of all highway vehicles. The program has made it possible for trucks, motor buses and private automobiles to operate at high speeds along direct routes without the enormous expenditures otherwise required to build private rights-of-way. In sum, the federal government has had a large part in the rise of the motor vehicle as an important and growing carrier of freight, and by far the most important carrier of passengers.

3. "The Resulting Depletion of Rail Revenues."

This Court knows judicially that the nation's economy has experienced rapid growth during the twentieth century, and that dollar-wise that growth has been accentuated by the marked decrease in the purchasing value of the dollar. National income has risen from $87.3 billions in 1929 to $277.5 billions in 1951,[21] and even in terms of constant dollars the increase has been large.[22]

While the nation's railroads have, of course, made gains over the past 30 or 40 years in terms of dollars of revenue and income and tons of freight hauled, the gains have not been at all commensurate with the growth of the nation's economy or with the declining value of the dollar. Competition from other forms of transportation, principally highway carriers, has substantially reduced the railroads' share of the nation's transportation dollar.

Motor freight is higher rated traffic than railroad freight,

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[21] Statistical Abstract of the United States, 1952, p. 255.

[22] Gross national product in constant (1939) dollars has increased nearly 100% in the past 25 years, from $85.9 billions in 1929 to $167.3 billions in 1951. *Id* at p. 254.

on the average, and the rise in revenues of the trucking industry, as compared with the railroads, has thus been particularly significant. In the 10-year period, 1940-1950, alone, the percentage of motor carrier freight revenue to railroad freight revenue nearly doubled, rising from 24.2% in 1940 to 47.1% in 1950.[33] The declining proportion of railroad revenues is also shown by the fact that, whereas in 1939 railroad operating revenues amounted to 5.6 cents of every dollar of national income, that figure had shrunk to 3.7 cents per dollar of national income in 1952.[34] In short, the trucks have not only taken substantial amounts of business from the railroads, but the traffic they have taken has been of the most profitable kind formerly carried by rail.

The shift of short-haul business has, of course, been even more extreme. The Santa Fe's witnesses testified that trucks have taken nearly all the short-haul traffic from the railroads (AR. 27, 38), and this conclusion is well illustrated by the fact that in California, in 1951, highway carriers received nearly three-fourths of the gross revenue from transportation of property within California, leaving only 19.3% for the steam railroads.[35]

It is well known that the shift of passenger traffic from the railroads to the highways has been equally striking. In 1929, for example, buses handled 22% of all intercity passenger business by railroad and highway, excluding private automobile traffic, while the railroads handled 78%. By 1951, on the other hand, the proportion carried by buses had risen to 43% and by railroad had declined to 57%.[36]

But the "revolution" has been most drastic in its shift of railroad passenger traffic to the private automobile. In 1929, automobiles already accounted for over 154 *billion*

[33] See Table 5 of Appendix A to this brief.

[34] I. C. C. Bureau of Transport Economics and Statistics, *Monthly Comment*, dated August 12, 1953, p. 10.

[35] See Table 4 of Appendix A to this brief.

[36] See Table 6 of Appendix A to this brief.

intercity passenger miles, compared with approximately 24 billion passenger miles for the railroads. By 1951, private automobile transportation had more than doubled, to a new total of 362 billion passenger miles, while railroad passenger miles had risen only slightly to 30.6 billions.[37] As of 1951, therefore, travel by highway (automobile and bus) represented nearly 93% of the total passenger miles traveled by rail and highway, while the railroads' proportion had shrunk to approximately 7%.

These facts and figures are recited not for the purpose of pleading that, because railroads have lost their former position in the transportation field, they are entitled to public largesse or preferment over other forms of transportation. They are vital, however, as showing, first, that in view of the relative decline in railroad revenues and the contemporaneous increase in highway revenues, it is wholly unreasonable to require the railroads to construct highway improvements for the benefit of vehicular traffic which is largely competitive; and second, that the great and increasing commercial importance of highway transportation justifies imposition of such costs upon those who benefit directly from the use of the highways.

4. "The Change in the Character, the Construction and the Use of Highways."

No extended discussion is necessary to demonstrate to the Court the tremendous advances in highway construction in recent years. In 1904, when the first national survey of roads was made, there existed only 153,662 miles of surfaced roads in the United States, of which all but a fraction were of gravel or stone construction. Paved roads did not become common until after the World War I, and the early paved roads usually consisted of only two lanes, each 7 to 9 feet in width.

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[37] *Ibid.*

The modern highway is often of 6 or more lanes in width, as is true in both cases now on appeal, and present highway lanes are usually 9 to 11 feet wide. Dual highways, limited-access superhighways and turnpikes, all of which involve numerous grade separations at points of intersection with other highways and railroads, are becoming increasingly common in all sections of the country.

The use made of the highways under modern transportation conditions has changed in quite as marked degree as the highways and vehicles themselves. Speed of movement is one obvious illustration. In 1901 the first law regulating the speed of automobiles was passed in Connecticut, and provided a limit of 12 miles per hour on the highway and 8 miles per hour in cities. As late as 1918 legal speed limits ranged from 15 to 30 miles per hour in all but one state, which permitted speeds of 40 miles per hour.[38] Today legal maximum speed limits range from 40 miles per hour in some states to 70 miles per hour in others, and in a few states there is no stated maximum.

Engineering surveys made by the United States Bureau of Public Roads have developed information with respect to the distribution of traffic in the United States. In the course of these surveys 565,703 vehicles were counted at 536 stations throughout the country. Of these vehicles 427,620 or 75.6% were automobiles, 7,940 or 1.4% were buses, and 129,849 or 23.0% were freight vehicles.[39] It was also found that over 50% of all single unit trucks were over 20 feet in length, while well over half of all tractor-truck and semi-trailer combinations were over 32 feet long, including some over 50 feet in length. Over 21% of all trucks were 8 feet in width or over, while another

[38] Public Roads Administration, *Highway Practice in the United States of America* (1949), p. 7.

[39] Bulletin 116 of Agricultural and Mechanical College of Texas (Jan. 1, 1950): *Highway Loads and Their Effects on Highways*, pp. 15-21.

44.9% were seven feet or more in width. With respect to heights, most trucks were under 12.5 feet, but some ran as high as 14 feet and over.[40] A majority of the buses counted in the survey (54.1%) were between 30.1 and 54.9 feet in length, while 64.1% were 8 feet or more in width.[41] Thus, while 7 foot lanes and 10 to 12 foot vertical clearances were adequate to serve early automobile traffic, modern truck and bus dimensions, together with the need for an additional safety factor due to high speeds of travel, have made necessary 9 to 11 foot lanes and 14 to 15 foot vertical clearances.

Another indication of the increasing use to which highways are being put in the United States is supplied by annual traffic counts taken by the California Division of Highways. A count taken on a Sunday and Monday of each year at the midpoint on Route 99 between Los Angeles and San Francisco shows the following results:[42]

Year	Trucks	Buses	Autos	Total
Sunday—				
1924				2,862
1928				3,522
1930	229	13	3,907	4,149
1940	930	34	6,321	7,285
1950	1,576	137	16,803	18,516
Monday—				
1924				2,175
1928				2,660
1930	389	13	2,712	3,114
1940	1,265	32	4,204	5,501
1950	2,607	139	13,925	16,671

[40] One reason advanced for the new Washington Boulevard structure is to increase the vertical clearance from 13'8" to 15 feet to accommodate larger trucks.

[41] Institute of Traffic Engineers, *Traffic Engineering Handbook* (1950), pp. 13-16.

[42] California Division of Highways, records of annual traffic counts.

Thus, the increase in week-day total traffic between 1924 and 1950 was 666%, and between 1940 and 1950 the increase was 203%. Similar results were obtained at other check points.

These facts and figures do not adequately tell the story. But they do indicate that the public road has become a very different thing in character, in construction and in use since the days of the horse and wagon. Even the highways being built in 1935, when the *Nashville* case was decided are old-fashioned by modern standards.[43] Six-lane roads, such as those involved in the present cases, are becoming commonplace. The dominant purpose of the new roads now under construction is to speed up, to reduce the cost and to improve the efficiency of what has become a great new system of transportation. The grade separation is an integral part of that plan, and it is no different from any other element of highway design in respect of its purpose and justification.

5. "The Change in the Occasion for Elimination of Grade Crossings, in the Purpose of Such Elimination, and in the Chief Beneficiaries Thereof."

There can be no disputing the fact that, until the automobile became an efficient and widely adopted means of transportation, the almost invariable reason for requiring construction of grade separations was to remove the accident hazard. There was little economic incentive for separating grades, since delays were of small consequence, both because of slow speeds and because of relative infrequency of vehicular traffic. Indeed, as was pointed out in a report to the Massachusetts legislature in 1889, rail-

[43] It may not be doubted also that it was a thin trickle of commercial trucks that moved over the Tennessee highway there involved in 1934 in comparison with the swollen stream of railroad competitive traffic now using Washington and Los Feliz Boulevards.

road lines were originally laid at grade level with the express consent of the community, and grade separations were ruled out because "people protested against changing grade of streets."[44] No doubt horse-drawn vehicles were impeded more by the inclined approaches usually necessary in grade separation construction than by having to wait while trains cleared the crossing.

The fact that the accident hazard was the source of almost all agitation for separation of grades in the years preceding the "transportation revolution," and was the principal basis for assessing the cost against the railroad which created that danger, is clearly shown by the decisions of this Court and the courts of the several states approving such assessments. See *e. g., State* v. *St. Paul, M. & M. Ry. Co.*, 98 Minn. 380, 108 N. W. 261 (1906). Mr. Justice Brandeis pointed out in the *Nashville* case:

> "Early cases establishing the rule that the entire cost of a grade separation may be imposed upon the railroad perhaps reflect the attitude that 'the business of railways is specially dangerous,' *Thorpe* v. *Rutland & B. R. Co.*, 27 Vt. 140, 150, 62 Am. Dec. 625; and that 'crossing highways and running locomotives, were they not authorized by law, would be nuisances.' Mr. Justice Strong, dissenting in *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 679." 294 U. S., at 429 (footnote 37).

In every case in which this Court sustained the power of the states to assess the full amount of a railroad-highway grade separation against the railroad, the justification therefor was always the state's authority, under the police power, to promote the public safety. In *Missouri Pacific Ry. Company* v. *Omaha*, 235 U. S. 121, 127 (1914), for example, this Court said:

> "This is done in the exercise of the police power,

[44] Report of an Investigation into the Subject of the Gradual Abolition of Crossings of Highways by Railroads at Grade," a report to the Massachusetts Legislature dated January 31, 1889, pp. 17-18.

> and the means to be employed *to promote the public safety* are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations *made in the interest of public safety* which the legislature has duly enacted."

Similarly in *Erie R. Co.* v. *Board of Public Utility Commissioners*, 254 U. S. 394, 410, this Court stated that "the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and *so far as the safety of the public requires.*"

This Court summarized its holdings in the earlier grade separation cases in *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U. S. 613, a case decided within a month after the *Nashville* decision. This Court there held that a pipe line company may not be required, without compensation, to make changes in its transmission lines necessitated by the construction of highways across its right-of-way; the opinion refers to the railroad crossing cases as follows:

> "The rule in respect of railroad crossings applies *when there is substantial risk of injury to the public from the operation of trains*, and ground to imply the company's consent to take such measures as may be necessary *to prevent the hazard*. This Court has not sanctioned extension of the rule to wholly dissimilar circumstances; it *does not apply to structures which are unattended by serious danger to the public.*" 294 U. S. at 622.

If, then, danger to the public was originally the occasion for both the construction of grade separations and

the imposition of costs of such construction upon the railroads, it becomes highly relevant to inquire whether that factor is the basis of the Commission's orders in the cases before the Court.

Manifestly, it is not. There is no pretense that danger from railroad operations is the occasion for either of the separations here involved. In the *Santa Fe* case a separation now exists, and no claim is or could be made that dangers incident to railroad operations contribute in any way toward the necessity of widening and heightening the present structures. On the contrary, the Commission itself found in its original opinion that "the widening of the underpass is now necessitated by the increase in vehicular and pedestrian traffic" (R. 141) and stated unqualifiedly:

> "Thus we are specifically faced with the problem of who shall pay the cost of widening of the underpass where the necessity for such widening is *not due to the activities of the railroad but rather to the needs of the automotive and pedestrian traffic.*" (AR. 142.)

Similarly, the proposal to eliminate the Southern Pacific's Los Feliz grade crossing, which is equipped with modern crossing gates and warning devices, is not based upon the accident hazard but upon elimination of highway traffic congestion, as the City's application demonstrates (SR. App. 4-5). In addition, the record in the Southern Pacific case adequately demonstrates that, with the existing protection, there is virtually no hazard whatever at the Los Feliz crossing. Despite the fact that about 27,000 vehicles per day traverse this crossing, accidents have been negligible and it could not reasonably be contended, and the Commission did not suggest, that public safety requires or would warrant the tremendous expenditures ordered by the Commission.

As a matter of fact, throughout the United States the

elimination of railroad-highway grade crossings is no longer considered as a problem of public safety but of transportation economics. Those most concerned with highway safety are first to point out that, if money is to be spent in eliminating highway accident hazards, there are far more critical safety problems than that presented by the railroad grade crossing. The Director of the Institute of Transportation and Traffic Engineering of the University of California has stated:

> "Because railroad grade-crossing accidents are often spectacular and receive wide publicity, conceivably there is danger that the grade crossing problem could be overemphasized and thus detract needed support from more critical highway safety problems."[45]

And a 1951 report of a California legislative fact-finding Committee concludes:

> "The accident factor, or hazard, while frequently mentioned in hearings and public demands for separations, does not appear alone to be sufficient justification for the construction of separation structures. Studies of the Public Utilities Commission and others, indicate that, in general, safety can be obtained much less expensively by use of modern protective devices."[46]

The accuracy of these conclusions can be demonstrated in several ways. In the first place, railroad crossing accidents have decreased in comparison with all highway accidents in California from 8.5% of the total in 1930 to only a little more than 1% in 1951.[47] The number of per-

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[45] Davis, *The Railroad Grade Crossing Problem*, proceedings of Engineering Section, 1950 Governor's Traffic Safety Conference (California), p. 28. See also, *e.g.*, Minnesota Legislative Research Commission, *Grade Crossing Accidents in Minnesota* (1948), Introduction.

[46] Third Report of The Assembly Interim Fact-Finding Committee on Tideland Reclamation, Etc. on the Railroad-Highway Crossing Problem in California (1951), p. 10.

[47] *Id.* at p. 31.

sons killed and injured at grade crossings shows a similar trend. In 1915 there were 21.5 casualties per 10,000 vehicles attributable to grade crossing accidents in California, while in 1949 that figure had dwindled to 2.0.[48]

The change in the occasion and purpose of grade crossing elimination has necessarily brought with it a change "in the chief beneficiaries thereof." This fact is well illustrated by the results of a study prepared jointly by the parties in the *Southern Pacific* case and referred to by the Commission in its opinion (SR. App. 27-29). As a result of that study it was estimated that delay at the Los Feliz crossing results in an annual cost to highway vehicles of $57,362 (SR. App. 28, 87), and that those who use the highways will therefore benefit in that amount every year as a result of the construction of a grade separation.

The study also found that the Southern Pacific now expends a total of $14,528 annually in crossing protection (SR. App. 28, 29, 87). While construction of a separation will eliminate this expense, additional expenses in the form of depreciation and maintenance of the new structure at a yearly cost of $8,611 will reduce the railroad's net annual benefit to $5,917. The result in that the benefit to the railroad from the construction of a grade separation at Los Feliz Boulevard will be only approximately 10% of the total, as against a 90% benefit to users of the highway.

It is paradoxical indeed that, while the Commission utilized these figures in determining that the economic benefit to all parties from the proposed separation justified its construction, it disregarded them competely in apportioning the costs as between the parties so benefited. To assess the costs of construction equally between the railroad and the public is to disregard completely the fact that

[48] *Ibid.* The nationwide average for 1949 was 1.11 per 10,000 automobiles. Beggs, *op. cit. supra* (note 23), p. 18.

the "chief beneficiaries" of a grade separation are no longer the railroad but the users of the highway.

6. "The Change in the Relative Responsibility of the Railroads and Vehicles Moving on the Highways as Elements of Danger and Causes of Accidents."

Among the facts which this Court stated in the *Nashville* case had been found by the trial court to be true or were subject to judicial notice was the following:

> "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from danger incident to motor transportation." 294 U. S. at 422-23.[49]

This statement is amply borne out by the facts. In a report of the National Safety Council delivered to the 37th National Safety Congress, the principal causes of accidents occurring at grade crossings are stated as follows:

1. The motorist fails to observe and obey crossing warning signs and signals.

2. The motorist sees the train approaching but misjudges the speed.

3. The motorist waits for one train to clear then starts across, but is struck by another train approaching from the opposite direction.

4. The motorist is so familiar with the crossing, having passed over it hundreds of times, that he uses no caution.

5. The motorist has defective eyesight, defective hearing, or both, or is otherwise physically or mentally deficient.

6. The motorist has too much alcohol in his system.

7. The motorist, driving at night over familiar terri-

[49] In a footnote, this Court noted that accidents caused by motor vehicles running into trains amounted in 1928 to 22% of the total grade crossing accidents; in 1929 to 24%; in 1930 to 26.5%; in 1931 to 28.6%; in 1932 to 30.6%; and in 1933 to 31.3%.

tory, drives at a speed too great for conditions existing, consequently, he cannot stop in time.

8. The motorist drives a faulty car and is unable to stop or start at the proper time, or stalls his car on the crossing.[50]

The report further points out that the intersection of a railroad line and a highway is no different, from the point of view of safety, from the intersection of two highways, and that there is no reason why responsibility for accidents caused by vehicle drivers should be assigned to the railroads, stating:

> "* * * by tradition dating back to the horse and buggy day, there has fallen upon the railroad the major burden of protecting the crossing. The railroads can stop the motorist by thrusting a gate down in front of him. They can swing a red lantern or wave a red flag in his face. They can whistle at him, but it is not possible for the railroads themselves to educate the motorist on the highway and certainly it is not possible for the railroads to police them."[51]

In California, as in substantially all other states, the Commission has authority over the installation, usually with the railroad meeting half or more of the expense, of safety devices at grade crossings. Modern automatic devices are virtually foolproof in design and performance and give unmistakable and ample warning of approaching trains. Nevertheless, at grade crossings, as elsewhere, some motorists will disregard signals, drive at excessive speeds, drive while intoxicated, or otherwise endanger their own lives and the lives of others. Except for the fact that railroad crossings are much better guarded than ordinary highway intersections, there is no significant difference between the two.

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[50] *Report of Highway-Railroad Crossing Committee*, Transactions of 37th National Safety Congress, Vol. 27, p. 35.

[51] *Ibid.*

The facts stated above lead inevitably to one conclusion, namely, that the factors considered by this Court in the *Nashville* case to demonstrate that the assessment of 50% of the costs of constructing a grade separation against the railroad without regard to the benefits to the railroad is arbitrary and unreasonable have expanded and multiplied in the years since that decision was handed down. The "transportation revolution" then in progress has proceeded to an extreme which could scarcely have been envisioned in 1935. The trends there referred to have all continued—and with added impact. The ultimate conclusion which this Court reached in the *Nashville* case and must necessarily reach again is that the railroad-highway grade separations is a public highway improvement "*comparable to removal of grades and curves, to widening the highway, to strengthening and draining it, to shortening distance, to setting up guard rails, and to bridging streams.*" 294 U. S. at 422. To the extent that the railroad benefits, it must pay. But there is no logical or reasonable basis upon which the railroad may be "singled out to bear the cost of advancing the public convenience" or to pay the *public's* share of a *public* improvement. The California Commission's orders assessing 50% of the costs of these separation structures against the respective appellants do precisely that.

D. The Views of Experts and Informed Opinion Everywhere Reject the Arbitrary Assessment of Grade Separation Costs Against Railroads.

Because the problem of accommodation here presented is so widespread and has occasioned so much reasoned consideration, it is relevant to inquire as to the views of experts, informed persons and government bodies toward the question before this Court. If doubt had been thrown upon the *Nashville* decision by time and experience, if it had

been impeached on the ground of justice or logic or found to be at odds with subsequent informed public and professional opinion, this Court might conclude that it was either incorrectly decided or that it should now recognize changed conditions. On the other hand, if this Court's analysis and conclusions have met wide acceptance and approval, the California Commission's action must be regarded as regressive.

1. The Views of Experts and Informed Persons and Groups.

The heart of the opinion in the *Nashville* case is the conclusion that the facts there presented indicated that grade separations are now in essence public improvements, and that:

> "* * * so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them." 294 U. S. at 430.

The view that a railroad should have to pay toward construction of a grade separation only in the amount of the "benefits" it receives had been advanced by several impartial groups even prior to this Court's decision.

On January 30, 1933, the Joint Committee of Railroad and Highway Users recommended:

> "State laws requiring railroads to make capital expenditures for grade-crossing elimination in excess of capitalized savings in operating expenses therefrom should be repealed. In computing the savings the only items to be considered are those of a tangible nature, such as relief from employment of watchmen, crossing tenders or automatic devices, maintenance of crossing and the like. When the foregoing principles are accepted, each case should be considered on its merits and final decision as to whether the crossing should be eliminated and, if to be done, the division of the cost should be determined jointly by the Public

Service Commission and the Highway Commission of the State."[52]

The same conclusion was reached the following year (1934) by the National Conference on Street and Highway Safety, which stated:

"Progress with railroad grade-crossing elimination continues slow, largely due to the policy of placing upon the railroads a large part of the cost of improvements needed because of the rapid increase in motor traffic. In the interest of expediting elimination of the hazards of grade crossings, the public should assume a larger share of the expense and that of the railroads should be limited to the resulting capitalized savings in their operating expenses of a tangible nature, such as relief from employment of watchmen, crossing tenders or automatic devices, maintenance of crossings and the like."[53]

In 1938, two years after this Court's decision in the *Nashville* case, Mr. Joseph Eastman, the Federal Coordinator of Transportation, published a voluminous report entitled "Public Aids to Transportation." In volume II of this report extended consideration was given to the question of the proper allocation of costs of constructing grade separations. The analysis of the benefits to the various parties concerned arising out of construction of a grade separation is prefaced with these remarks:

"The conception of the responsibility for the elimination of grade crossings here expounded, which is in line with actual developments over many years in the States and with Federal participation under Federal aid acts and during the depression, gives major importance to the question of convenience and to the

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[52] *Regulation and Taxation of Highway Transportation*, a report of the Joint Committee of Railroads and Highway Users dated January 30, 1933, p. 15.

[53] *Guides to Traffic Safety*, a report approved by the Fourth National Conference on Street and Highway Safety, p. 29.

competitive relations of rail and motor transportation. * * * Analysis of the varied benefits which the elimination or adequate protection of grade crossings confers appears to be the only means of approach, in general terms, of how far railroads will or may be required to bear grade crossing costs in the future."[54]

The same year a committee was appointed by the President of the United States to submit recommendations on the general transportation situation, and its report, dated December 23, 1938, concluded:

"There has been a tendency recently for Congress and the courts to recognize that the problem of separating railroad grade crossings is a public problem, of much greater interest to travelers on the highways than to the railroads. It is obviously unfair that the railroads should be required to meet these heavy expenditures which are made more for increasing capacity and expediting highway traffic than for considerations of safety."[55]

More recently Dr. Beggs has made a most complete and detailed analysis of the question of proper allocation of grade separation construction costs. He concludes, with respect to this problem:

"The *economic* benefits and services taken into account in each case are those which accrue to the general public, to highway users, and to the railroads. The ratio of the net benefits for each beneficiary to total net benefits should determine allocation of costs."[56]

The author further concludes that a policy of assigning

[54] Federal Coordinator of Transportation, *Public Aids to Transportation* (1938), Vol. II, p. 279.

[55] Report of "Committee Appointed September 20, 1938, by the President of the United States to Submit Recommendations Upon the General Transportation Situation," dated December 23, 1938, p. 24.

[56] Beggs, *op. cit. supra* (note 23), p. 47.

costs for grade crossing improvements to railroads on the basis of a fixed percentage of total costs, as in the present cases, "is no more realistic or economically sound than is an assumption that the economic nature and character of the grade crossing area, crossing usage, and highway development and usage may be identical as between grade crossings."[87]

Thus, the Commission, in asserting the right to assess all of the separation cost against the railroad, this being embraced in the asserted power to assess an arbitrary percentage of the cost, flies in the face of the great weight expert and informed judgment on the subject. It is the opinion of all impartial groups which have studied the matter that it is neither fair to the railroads, economically sound, nor in the interest of a progressive highway program to require the railroad to pay an amount in excess of its benefit from the construction.

2. The Position of the Federal Government.

In the Federal-Aid Highway Act of 1944, 58 Stat. 838, the Congress expressly recognized and adopted the benefit principle as the proper basis upon which the costs of constructing railroad-highway grade separations should be apportioned. As stated above, that Act authorized the annual appropriation of $500,000,000 in federal funds to the states for use on the Federal-aid highway system, on principal secondary and feeder roads, and in urban areas. Section 5(b) of the Act deals specifically with allocation of grade separation costs and provides in part:

> "(b) Any railway involved in any project for the elimination of hazards of railway-highway crossings paid for in whole or in part from funds made available under this Act, shall be liable to the United States for a sum bearing the same ratio to the net benefit

[87] *Ibid.*

received by such railway from such project that the Federal funds expended on such project bear to the total cost of such project bear to the total cost of such project. For the purposes of this subsection, the net benefit received by a railway from any such project shall be deemed to be the amount by which the reasonable value of the total benefits received by it from such project exceeds the amount paid by it (including the reasonable value of any property rights contributed by it) toward the cost of such project, and in no case shall the total benefits to any railway or railways be deemed to have a reasonable value in excess of 10 per centum of the cost of any such project."

Benefits to the railroad, the standard referred to in the *Nashville* case as appropriate for allocating costs of public improvements, is thus the federal standard. And recognition of the fact that grade separations, under present circumstances, are chiefly of benefit to users of the highway has led Congress to impose a maximum payment by the railroad of 10% of the cost of the project, insofar as federal funds are concerned.

Moreover, in administering this statute the Public Roads Administration has ruled that when existing grade separations are replaced with larger structures, as is true in the *Santa Fe* case, the new construction "shall be considered as not resulting in ascertainable benefits to the railroad, and consequently no contribution to the cost of such project by the railroad shall be required."[58]

3. The History of Grade Separation Assessments in California.

One of the most unusual features of the present cases is the fact that for many years prior to the decisions under review the California Commission itself recognized and

[58] Public Roads Administration, General Administrative Memorandum No. 325, dated August 26, 1948.

followed the benefit principle in allocating the costs of grade separation structures. Indeed, the Commission anticipated this Court's decision in the *Nashville* case by several years. As has been stated, an application to replace the Santa Fe's Washington Boulevard grade separation was granted by the Commission in 1932 but never acted upon by the City of Los Angeles. In its order authorizing the construction the Commission allocated the costs of the project 25% to the Santa Fe and 75% to the City, basing its departure from its previous practice of making 50-50 allocations on this ground:

> "There can be no question that the vehicular public will receive the greatest benefit from the widening of these separations, so it logically follows that this class of the public should bear the greater portion of the cost."[59]

During the following year, which was two years prior to this Court's decision in the *Nashville* case, the California Commission elaborated on its reasons for abandoning the practice of arbitrary allocations in a decision known as the *Goshen Junction* case. The basis of the decision is so similar to that of the *Nashville* case and so fundamentally at variance with the Commission's present position that the following excerpt from the Commission's opinion is commended to the especial attention of the Court:

> "In allocating the costs here we are departing from the practice which has obtained generally heretofore of assessing one-half to each the public and the railroad in case of an existing grade crossing. While this procedure has appeared equitable in the past, *the tremendous changes in transportation conditions make necessary a reappraisement of the liabilities of the two parties at interest.* The railroad still continues to be

[59] *Application of the City of Los Angeles* (Decision No. 25069), 37 C. R. C. 784, 787 (1932).

the aggressor in preventing the free and unhampered use of the public thoroughfare, but the needs of the traffic on the highway have not only increased and changed in nature, but *the use of the highway has become in large measure directly competitive with the rail line.* These and incidental conditions following them have changed the benefits flowing from the separation of grades between these two great avenues of traffic.

"After carefully considering all the evidence in these proceedings, it is concluded that the order should authorize the grade separation, as proposed, and fix the amount to be contributed by the railroad in a lump sum based upon direct and indirect benefits. This sum is arrived at by capitalizing an amount measuring the annual benefits and privileges on a 6 per cent basis. If applicant elects to proceed with the construction of the separation, where according to the record there is some question as to its present economic justification, it shall bear the remainder of the cost and choose the width of subway it desires to construct."[60]

During the same year the Commission in three other decisions adhered to the benefit principle[61] and from 1933 to 1949, when the Commission's original order in the *Santa Fe* case was handed down, there was no question that California grade separation assessments were to be determined upon the basis of relative benefits.[62] As a result, during that period the Southern Pacific's proportion of the cost

[60] *Application of the Department of Public Works* (Decision No. 25551), 38 C. R. C. 380, 386 (1933).

[61] *Application of the Department of Public Works* (Decision No. 25588), 38 C. R. C. 425; Same (Decision No. 25811), 38 C. R. C. 606; Same (Decision No. 25812), 38 C. R. C. 612.

[62] In reply to a questionaire reported in the Proceedings of the 45th Annual Convention of the National Association of Railroad and Utilities Commissioners (1933), in which the question was asked as to what percentage of the cost of eliminating grade crossings is borne by the railroad and state or municipality, the California Commission answered: "Not fixed. Some cases by agreement, others by Commission allocation as measured largely by benefits." (p. 489).

of constructing grade separations was generally 10% or less, except where a new railroad line was built across an existing roadway (SR. App. 92-97). The Santa Fe's experience was very similar.

The Commission's strange about-face in reverting to its pre-1932 position of arbitrarily allocating grade separation costs is shrouded in mystery. In its opinion in the *Santa Fe* case the Commission concedes long adherence to the benefit principle but then states:

> "However, this record discloses that material changes have taken place in conditions at the present time as compared to those in 1932. As we said in Decision 43374, *supra*, 'The great increase in population and the tremendous increase in motor vehicle traffic present a new problem.'" (AR. 129).

This statement is incongruous in the extreme. It is the very changes in conditions brought about by the increase in motor vehicle traffic, which the Commission now says "present a new problem," that led the Commission to adopt the benefit principle in the first place. And it is this very change in conditions that moved this Court, in the *Nashville* case, to hold that imposition of all, or an arbitrary proportion, of grade separation costs upon the railroad was unjust and unreasonable. In short, the Commission now relies upon an extreme progression of the "transportation revolution" which caused it to abandon arbitrary assessments against the railroads in 1932 as the reason for a return to that practice.

4. The Practice in Other States.

The present action of the California Commission is in direct opposition to that of practically every other state taken since the *Nashville* decision was handed down. Since 1935, every new state enactment on the subject, without ex-

ception, has either expressly adopted the benefit basis of allocation or has fixed the railroad's share of grade separation costs at a low percentage figure designed to approximate actual benefits.

An outstanding example of the general public acceptance of the *Nashville* doctrine is the action taken by New York in 1938. In that state a constitutional amendment, approved by the voters, was necessary to formal adoption of the benefit principle. A bi-partisan campaign in the legislature and in public forums resulted in overwhelming approval of an amendment to Article 7, Section 14 of the state constitution to provide that the expense of any grade crossing elimination work is to be borne in the first instance by the State, which may then recover from the railroad as reimbursement:

> "(1) the entire amount of the railroad improvements not an essential part of elimination, and (2) the amount of the net benefit to the company or companies from the elimination exclusive of such railroad improvements, the amount of such net benefit * * * in no event to exceed fifteen per centum of the expense of the elimination."

Since 1938, therefore, New York's tremendous highway and grade separation program has been carried out on the benefit principle.

Other states have enacted similar measures. In 1939, Michigan adopted a statute apportioning grade separation costs "according to benefits, but not to exceed 15 per cent thereof by the railroad or railroads interested and the balance thereof by the state, or subdivision thereof."[63] In 1951, Minnesota adopted an amendment to its statute providing that "the division of the costs between the railroad and the state shall be on the basis of benefit to each."[64]

[63] Mich. Stats. Anno., Title 9, § 9.1145.

[64] Minn. Stats. Anno., ch. 219, § 219.40.

Nebraska, in 1949, provided that grade separation costs in cities and villages shall be apportioned between the city and the railroad in such proportions "as the board shall find the public and railroad company or companies are respectively benefited."[65] And in 1952, the Virginia legislature substituted for an arbitrary percentage apportionment statute a provision directing allocation of costs on the basis of what "is fair and reasonable, having regard to the benefits, if any, accruing to such railroad or railroads from the elimination of such grade crossings."[66] And the statutes of Massachusetts, even prior to 1935, had provided that separation costs should be apportioned between the railroad and the public "equitably and in accordance with the relative benefit to be derived by each from such alterations."[67]

Since the *Nashville* decision, moreover, the following states have adopted statutes limiting railroad participation in grade separation costs to specified percentages which are indicated by experience to represent maximum actual benefits to railroads: Indiana—20% when eliminating existing crossing, nothing when no crossing exists;[68] Maryland—25%;[69] New Jersey—15%;[70] New Mexico—10%;[71] and Ohio—15%.[72]

It is thus apparent that since this Court's recognition of the "transportation revolution" in 1935, and that of the California Commission two years earlier, there has been a notable change in public policy with respect to the responsi-

[65] Rev. Stats. of Nebraska, 1943, § 18-621.

[66] Code of Virginia, 1950, § 56-366.1.

[67] Anno. Laws of Mass., ch. 159, § 70.

[68] Burns Indiana Stats., § 55-1810.

[69] Flack's Anno. Code of Maryland, 1951, Art. 89B, § 41.

[70] N. J. Stats. Anno., §§ 48:12-62 and 48:12-70.

[71] N. Mex. Stats. of 1941 Anno., § 74-338.

[72] Page's Ohio Gen. Code Anno., §§ 8868, 8883.

bility of the railroads for costs of crossing separation. The realization that grade separations are now necessitated by and constructed primarily for the benefit of highway transportation has led to general recognition of the equitable principle that the railroad's costs should be limited to *its* benefits. This Court's conclusion, in 1935, that a state's refusal to take cognizance of the great changes in transportation conditions is arbitrary and unreasonable is thus reinforced not only by a mighty acceleration of those changes but also by the widespread public recognition of its justice.

5. The Position of Foreign Countries.

It is likewise relevant to the process of making judgments under the Fourteenth Amendment to inquire how other countries have handled the problem before the Court, for the experience and judgment of other peoples and other governments entitled to respect offers some indication of the direction of reason and justice.

Of the European countries about which information has been found, as of 1939, all had adopted some form of the benefit principle. In most cases no statute laid down the precise method of apportionment, but the following summary of laws and practice is submitted.

Great Britain.

In Great Britain an arbitrary allocation is not sanctioned; instead "it is understood that the railway share is limited to the capitalized equivalent of the savings expected to accrue from the elimination of gatemen, crossing keepers, and so forth."[78] These, of course, are the principal elements usually considered in determining "benefits" to the railroad in crossing elimination cases in this country.

[78] This and subsequent statements regarding the law and practice in European countries are taken from 70 Railway Gazette (London, March 10, 1939), pp. 400, 411-12.

France.

The proportions of the cost of grade crossing elimination borne by the railroad and the public have varied somewhat from time to time. "The railway share has varied between the capitalization of the amount saved through the elimination of the crossing (such savings being principally the crossing-keeper's wages) and double this amount."

Germany.

The method of apportioning grade separation costs in Germany was established by a law passed in 1930 which provided (1) that when the work was carried out to meet the requirements of the railroad, it must bear the cost and (2) when the construction was necessary to meet the needs of road transport, the authority which constructed the road must bear the cost. In both cases, however, "the party which did not ask for the work to be done is called upon to contribute to the cost a sum equal to the financial benefits derived from such work."

Switzerland.

In Switzerland the law requires the railways to take such measures, in respect of grade crossings, as are necessary to ensure the public safety. In practice, the railroads, as in Germany, bear the whole cost if the grade separation is constructed for the convenience of the railroad; but if the project is instituted in the interest of road improvement, the railroad is required to bear only "an amount representing the capitalization of the current expenditure on account of crossing-keeper's wages and other similar items."

Neither logic, nor reason, nor experience nor public policy supports the action of the California Public Utilities Com-

mission in these cases. The competition between highway-rail transportation has increased beyond anything the Commission could well have imagined when it decided, in 1933, that such competition, then in its incipiency, required that costs be allocated on the basis of benefits.[74] The legislature passed no new law requiring a return to an arbitrary allocation policy; no change in public or expert opinion can be relied upon in justification. The fact is that the Commission, for reasons never disclosed, has imposed upon the railroads the burden of the particular item of highway expense here involved, even though the benefits to be derived from the new construction flow almost entirely to users of the highways, of whom a great and growing number are in direct competition with the railroads. This action, we submit, takes appellants' property for public use without just compensation, contrary to the requirements of the Fourteenth Amendment.

II.

THE ARBITRARY ALLOCATION OF GRADE SEPARATION COSTS AGAINST THE RAILROADS CONSTITUTES AN UNDUE BURDEN ON INTERSTATE COMMERCE AND CONTRAVENES THE NATIONAL TRANSPORTATION POLICY.

It is not disputed that both the Santa Fe and the Southern Pacific are interstate common carriers, and that the interstate main lines of both railroads are involved in the two grade separations here in issue. The Washington Boulevard separation involves "one of Santa Fe's main lines to the East" (AR. 3), and "the coast and valley lines

[74] The Commission stated in 1933: "The tremendous changes in transportation conditions make necessary a reappraisement of the liabilities of the two parties at interest. * * * *The use of the highway has become in large measure directly competitive with the rail line.*" *Application of the Department of Public Works* (Decision No. 25551), 38 C. R. C. 380, 386 (1933). See text at footnote 60, *supra*.

of the [Southern Pacific] railroad operate over Los Feliz" (SR. App. 114). The question is thus presented whether a state commission order directing the construction or reconstruction of a railroad-highway grade separation constitutes an undue and unreasonable burden on interstate commerce when the effect of the order is to require an interstate carrier to bear the burden (in excess of its benefits) of "advancing the public convenience" through the construction of a local public improvement. Furthermore, since the chief beneficiaries of the new construction are highway vehicles, the question is also raised whether such preferment of one form of transportation over another is contrary to the National Transportation Policy enunciated by Congress, 54 Stat. 899 (1940).

Recent decisions of this Court have reaffirmed the long standing principle:

> "* * * that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman* v. *Hewit*, 329 U. S. 249, 252 (1946).

This Court further pointed out that the reach of the Commerce Clause is not limited to protection against state action which discriminates against interstate commerce but includes as well "any action which may fairly be deemed to have the effect of impeding the free flow of trade between States." *Ibid.* Nor can a state "avoid the operation of this rule by simply invoking the convenient apologetics of the police power." Justice Holmes, speaking for the Court in *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75, 79 (1914).

Again, as in the case of questions arising under the Four-

teenth Amendment, there is no mechanical formula by which the line may be drawn between state action that unlawfully impedes interstate commerce and action only incidentally affecting that commerce and therefore permissible. However, in a number of cases this Court has emphasized the fact that local regulation of interstate railroads which hinders or prevents the economical and efficient operation of the railroad violates the Commerce Clause. Accordingly, statutes or orders requiring frequent and unnecessary train stops have been held invalid, *St. Louis-San Francisco R. Co.* v. *Public Service Commission*, 261 U. S. 369 (1923); *Chicago, B. & Q. R. Co.* v. *Railroad Commission*, 237 U. S. 220 (1915); *Herndon* v. *Chicago, R. I. & P. R. Co.*, 218 U. S. 135 (1910), and various kinds of orders and statutes purportedly to advance the interests of safety or local public policy have been struck down, *Morgan* v. *Virginia*, 328 U. S. 373 (1946); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945); *Kansas City S. R. Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75 (1914).[13]

But perhaps most important, in determining whether the orders here involved constitute an undue burden on interstate commerce, is the fact that they interpose a substantial obstruction to the national transportation policy proclaimed by Congress. Cf. *Southern Pacific Company* v. *Arizona, supra*, p. 773. That statement of policy, which is the basis upon which the nation's transportation system must be developed, reads in pertinent part as follows:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and im-

[13] The *Kaw Valley* case is particularly apposite since it involved an order to remove certain railroad bridges over a river as an alternative to raising them. This Court, in an opinion by Mr. Justice Holmes, held the order violative of the Commerce Clause, on the ground that the dominant requirements of commerce with other states exceeded the local welfare to be served by destruction of the bridges.

> partial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."[76]

That policy is flouted in two important respects by the Commission's orders; first, because they adversely affect the efficiency and economy of rail transportation service; and second, because they result in preferment of one form of transportation over another.

A. The Effect of the Orders Upon the Efficiency and Economy of Rail Transportation Service.

In *Southern Pacific Company* v. *Arizona, supra*, this Court considered at length the question whether the state statute there involved (a train length law) imposed an undue burden upon interstate commerce. Mr. Chief Justice Stone, speaking for the Court, placed particular and repeated emphasis upon the fact that the statute had an adverse effect upon the efficient and economical operation of the railroad, contrary to the national transportation policy, and concluded the Court's opinion by saying:

> "Here examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail." 325 U. S. at 783-84.

It need hardly be argued that the railroads continue to

[76] 54 Stat. 899, 49 U. S. C. preceding § 1.

supply an essential transportation service, and that the national interest requires that they be preserved in full vigor. The facts demonstrate, we submit, that the imposition upon the railroads of the costs of constructing what are, in reality, public highway improvements will have a substantial adverse effect upon that national interest.

It should be emphasized that the two grade separations here involved are not isolated projects which, once constructed, will end the grade crossing elimination responsibilities of appellants in California or elsewhere. On the contrary, the present separation projects, although highly important, are merely steps in a tremendous statewide and nationwide program. The magnitude of that program and its disastrous effect upon the railroads if they must pay all, or a high arbitrary percentage, of the costs should be made clear to this Court. While nationwide figures are not available, the following indicates the extent of the grade separation program in California.

Upon the request of the Joint Fact-Finding Committee on Highways of the California Legislature, the Automotive Safety Foundation, in cooperation with the Division of Highways, U. S. Bureau of Public Roads, prepared a study of improvements required to serve present and future travel on the California state highways.[77] In this comprehensive study, which was intended to be an "analysis of needed improvements to the State Highway System upon which a sound program for the system's development can be based,"[78] it was concluded that the program should include 273 new railroad separation structures and reconstruction of 21 existing separations, a total of 294 separation proj-

[77] *California State Highways*, An Engineering Study of Improvements Required to Serve Present and Future Travel, prepared for Joint Fact-Finding Committee on Highways, California Legislature (1952).

[78] *Id.*, letter of transmittal.

ects! And of this total, 131 are considered to be needed immediately.[79]

These figures, it should be noted, include *only* separations required on the state highway system and do not include separations on county roads or city streets, as to which more will be said. The impact of this program upon the railroads if they are forced to bear an arbitrary share of the cost far in excess of any benefits therefrom will be readily understood. Of the 294 separations mentioned above, for example, the Southern Pacific is involved in 161, the locations of which are marked on the map attached hereto as Appendix B. Taking the average of the costs to be incurred in the two separation projects here involved ($1,031,277), not necessarily as representative of future projects but as suggestive of the possibilities, and assuming that the Commission continues its present policy of assessing 50% of those costs against the railroad, the Southern Pacific thus faces an exaction of over $83,000,000 for grade separation construction on the state highways of California alone. Moreover, an acknowledged power in the State to make purely arbitrary allocations, regardless of benefits received, would, of course, include the power to impose the whole cost upon the railroad, and it cannot be doubted that there would be proponents for that point of view.

But even such a staggering potential liability does not tell the whole story. In addition to separations on the state highway system, plans have been made to separate crossings on many city streets and county roads not a part of that system. For example, on January 5, 1951, a sub-committee of the Los Angeles County Grade Crossing Committee, made up of representatives of the County, the Cities of Los Angeles and Burbank, the Automobile Club of Southern California and several railroads, submitted a

[79] *Id.* at p. 53.

list of no less than 157 crossings *within the County of Los Angeles* for which it recommended construction or reconstruction of grade separations.[50] A map indicating the recommended projects, which was prepared by the Committee, is attached hereto as Appendix C. The certainty that the construction of many new separations will be demanded in the immediate future is demonstrated by the fact that the Washington Boulevard and Los Feliz separations, although characterized by the Commission and the cities as having "high priority" (AR. 16-18, 32, 141-142; SR. 123, 160), are actually only the tenth and eighteenth on the list, respectively.

It is thus apparent that, if the railroads are forced to bear the burden of constructing these highway improvements whatever their benefits from such construction, they face economic burdens which simply cannot be met. The competitive situation is such that the costs of such projects, which result in greater expenses for railroads and lower expenses for trucks and buses, cannot be passed on in the form of higher rates (AR. 30). As this Court recognized in *King* v. *United States*, 344 U. S. 254, 262 (1952), one of the pressing problems in furthering the national transportation policy is

> "the growth of vigorous competition from automobiles and other forms of transportation which made it futile to compensate for the passenger deficits by increasing passenger rates."

Whatever may have been true in years past, appellants cannot maintain the standard of service which they have established if the funds which would otherwise be spent for equipment, maintenance, wages and railroad operations must be spent on improving the right of way of their com-

[50] Of this number, 41 represented separations in the City of Pasadena, as to which the committee recommended that the Public Utilities Commission make a further study.

petitors. The nation's railroads have been held to "substandard" rates of return as a result of rising costs. *Ex parte* 175, 284 I. C. C. 589, 612 (1952). This condition has caused a congressional committee recently to express concern over the "precarious financial position" of the railroads.[81] Under these circumstances, as in *Southern Pacific Company* v. *Arizona, supra*, it is plain that "the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail." 325 U. S. at 783-784.

B. The Effect of the Orders as Preferment of Highway Over Rail Transportation.

The national transportation policy not only enjoins the promotion of adequate, economical and efficient transportation service but also declares that no one form of transportation shall be preferred over the other. Cf. *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 576-577 (1947). Here the State of California has done precisely that.

As has been indicated, the purpose of the new construction authorized by the Commission's orders is not to remove an accident hazard, which is completely absent in one case and *de minimis* in the other, but to speed the flow of trucks, buses and automobiles across the railroad. In the *Southern Pacific* case, for example, it has been determined that construction of the separation, by eliminating that delay, will save motor vehicle operators $57,362 a year (SR. App. 87-88). Yet despite these *admitted* benefits to highway transportation (as against a yearly benefit of $5,917 to the railroad) the State has assessed a full 50% of the costs of the improvement against the latter.

Such discrimination constitutes a clear preferment of

[81] S. Rep. No. 1039, 82nd Cong. 1st Sess. (1951), p. 46.

users of the highway over rail carriers contrary to the program and policy of the Congress. Congress itself set the federal standard in 1944 when it adopted the benefit principle with respect to grade separations constructed on federal-aid highways. See p. 62, *supra*. If each form of transportation pays according to the benefits it receives from the construction, no one loses, no one is preferred. But to impose a high arbitrary percentage of the total cost upon one form of transportation even though its benefits are small and those of the other are large is to violate the very rule of equality of treatment which the statement of national transportation policy was designed to implement.

III.

THE STATUTORY JURISDICTION OF THIS COURT.

The orders of this Court entered in these cases on May 18, 1953 (AR. 259; SR. 294) postponed the question of jurisdiction to the hearing of the cases on the merits. In their Statements as to Jurisdiction, appellants took the position that the orders of the Commission entered in these cases were state "statutes" within the meaning of Title 28 U. S. C. Section 1257 (2) and that this Court's jurisdiction to review the federal questions presented was properly invoked by appeal.

In motions to dismiss or affirm filed by the Cities of Los Angeles and Glendale as "real parties in interest," the contention was made that "the validity of a state statute is not involved in these appeals" because appellants' principal challenges are directed to the conditions in the Commission's orders which specify the cost allocations, and not to the orders as a whole; that those "portions of the orders are not legislative in character and are not statutes of the state within the meaning of Section 1257 (2)

of Title 28 of the U. S. Code," but are instead "judicial determinations under the organic law of California."

It should be noted at the outset that this contention does not affect this Court's jurisdiction to hear and decide the federal questions presented, but raises only the issue whether, under the particular circumstances here presented, review by certiorari rather than by appeal is proper. Even if it were to be assumed that the certiorari route should have been followed, the Court would treat the appeal papers in these cases as petitions for writs of certiorari. Title 28 U. S. C., Section 2103. Since arguments and briefs on the merits are being received and considered, this Court's determination of this jurisdictional question will not affect its ruling on the constitutional questions presented.

The California Commission, whose orders are here challenged, has never made or joined in the contention now made by the cities. It has never agreed that its orders in grade-separation cases are severable, or particularly that the portion of an order authorizing or directing construction of such a project is independent and separate from the portion allocating the costs of the construction. On the contrary, the Commission strongly contends, as pointed out in its opinions "that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California * * *" (SR. App. 32; AR. 128).

Section 1202 of the California Public Utilities Code, provides in part that the Commission has power:

> "(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense

> of the * * * separation of such grades shall be divided between the railroad * * * and the State, county, city, or other political subdivision affected." (AR. 128).

The cities would apparently have this Court hold that the Commission acts legislatively under the first clause of Section 1202(c), but assumes the role of a judicial body under the subsequent clause of the same section; that certain portions of its order represent the exercise of legislative power, while some of the "conditions" of that exercise of power represent concurrent judicial determinations by the same body.

There are a number of fallacies in this position, both logical and practical. The distinction between legislative and judicial action was pointed out by Mr. Justice Holmes, speaking for this Court in *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226 (1908), as follows:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

The allocation of costs in these cases can hardly be considered a declaration or enforcement of liabilities "under laws supposed already to exist," since the "liability" arises out of the very order which makes the allocation.

Just as the rate-making process was considered to be of legislative character in the *Prentis* case, the assessment of a charge against appellants for future construction "looks to the future and changes existing conditions." The fact that each order fixed an allocation of costs for only a single project is of no moment; the same is true of that part of the order directing the construction, which the cities recognize to be legislative in character.

It has been fundamental to the Commission's position throughout these proceedings that the allocation of costs, quite as much as the direction to build the separation, represents an exercise of the police power (AR. 128; SR. App. 32). It is precisely on that ground that both the Commission *and the cities* contend that the Commission is not bound to allocate the costs on the basis of benefits received. This Court has consistently held that the exercise of the police power is exclusively a legislative function. *Phillips* v. *Mobile*, 208 U. S. 472, 479 (1907); *Lawton* v. *Steele*, 152 U. S. 133, 136 (1894). In California it is also well-settled, as a matter of state law, that the exercise of the police power is purely legislative in character. *Curtis* v. *Los Angeles*, 172 Cal. 230, 234, 156 Pac. 462, 464 (1916); *Frost* v. *Los Angeles*, 181 Cal. 22, 28, 183 Pac. 342, 345 (1919).

As a practical matter, the portion of the order allocating costs cannot be severed from the portion directing construction of the separation. Each is essential to the other, and each would be wholly ineffective in the absence of the other. In each case the text of the order itself declares that the authority and direction for construction are subject to the condition, among others, that 50% of the "total cost shall be borne by" the railroad company concerned. No extended argument is necessary to demonstrate that these orders for the building of large and expensive structures would be of no effect whatever if they did not include due provisions for the raising of the necessary funds. The allocation provisions fulfill that indispensable requirement.

Finally, this Court has heretofore considered the precise question here presented and has held that the portion of a state commission order allocating costs of constructing a grade crossing facility represents a *legislative* act. In *Grand Trunk Western Ry. Co.* v. *Railroad Commission*,

221 U. S. 400 (1911), a state commission apportioned costs of constructing certain grade crossing protective devices between two railroads, whereupon one railroad brought suit to annul the order on the ground that the other was bound by contract to bear the entire expense. No question was raised as to the commission's authority to order installation of the devices; the sole question presented was whether the commission's allocation of costs impaired the obligation of the contract between the two railroads, contrary to the provisions of the federal Constitution. The very question here raised by the appellee cities was answered by this Court as follows:

> "Observing first, that the order is a legislative act by an instrumentality of the state exercising delegated authority (*Prentis* v. *Atlantic Coast Line R. Co.*, 211 U. S. 210, 226), is of the same force as made by the legislature, *and so is a law of the state* within the meaning of the contract clause of the Constitution [citations], we come to consider whether it does impair the obligation of the contract." 221 U. S. at 403.

See also, *Lake Erie & Western R. Co.* v. *Illinois Public Utilities Commission*, 249 U. S. 422 (1919); *Chicago & North Western R. Co.* v. *Ochs*, 249 U. S. 416 (1919); *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission*, 283 U. S. 380 (1931).

We respectfully submit that the contention made by the Cities of Los Angeles and Glendale is insubstantial. While appellants have challenged only the Commission's assessments of costs, they have always contended that such arbitrary assessments vitiate the Commission's orders in their entirety (AR. 3-5, 9, 256-257; SR. 7-9, 38-39, 290-292). The Commission's orders clearly represent the exercise of legislative authority and are thus state "statutes" within the meaning of Title 28 U. S. C. Section 1257(2). But whatever the Court's decision as to whether appeal or certiorari is the proper jurisdictional route, the ques-

tions presented are properly before the Court by reason of the provisions of Title 28 U. S. C. Section 2103, and this Court's decision on the merits is therefore justified and required.

CONCLUSION.

The judgments of the Supreme Court of California entered in these cases should be reversed.

Respectfully submitted,

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